No. 629

FILED

DEC 31 1941

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1941

DORA BRADY and LUCINDA WATASHE,
Petitioners,

vs.

ANNIE BEARDS; MELVINEY BARNETT DITTLER; THE ESTATE OF NELLIE BARNETT, Deceased; ESTATE OF JIMMIE BARNETT; MAHALEY FISH HICKMAN; WINEY FISH LEWIS; KATIE FISH LITZEY; FRAZIER FISH; MILLIE FISH GILROY; CHARITY BUCKLEY SMITH; WILLIAM FISHER; FRANCIS SUTTON, nee FISHER; MARIAN STEPHENS; LAURENCE H. FISHER; MARIAN FISHER TOMPKINS; LEWIS FISHER; ROSA FISHER; SUSIE CONNER; Heirs of Emma Burgess, Husband, For Himself and as Next Friend of His Minor Children; WILLIAM BURGESS, LITTLE JOHN BURGESS, SISSIE BURGESS, NOAH BURGESS, and JOE BURGESS; MAY (PLANTAH) CONNER; WYNIE CONNER HERRICK; REBECCA J. BAKER; KATIE WILLIAMS, nee KNIGHT; Heirs of Lou Williams, Deceased; M. L. WILLIAMS; JOHN F. DAVIS; LUCY KNIGHT; EMMA BEAR; ANNIE COBAR, nee CONNER; NETTIE BEAR, nee CONNER; WILLIE CONNER; JOHN CONNER; CHEROKEE STEPHEN; BARNEY STEPHEN; EMMA GOOCH; IDA GOOCH; and ELSIE GOOCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT TO REVIEW A JUDGMENT AFFIRMING THE JUDGMENT OF THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF OKLAHOMA AND SUPPORTING BRIEF

CHAS. E. McPHERSON,
442 Key Bldg.,
Oklahoma City, Oklahoma,
Attorney for Petitioners.

December, 1941

INDEX TO PETITION FOR WRIT OF CERTIORARI

Page

(All emphases are petitioners' unless otherwise stated. The transcript of record in the trial court comprises 3 parts, the Reporter's Transcript, referred to as "Rep. Tr."; the Clerk's Transcript referred to as "Clk's Tr."; and the Exhibits of the different parties, referred to by number or letter. An Appendix is filed herewith, consisting of two volumes. Volume I comprises the Briefs and Petition for Rehearing of Petitioners, as appellants, and Volume II contains the Answer Brief of Respondents, as appellees, in the Circuit Court of Appeals. The Transcript of the Record of Proceedings in the trial court contains approximately 8,000 pages of purely incompetent, irrelevant and immaterial evidence, and only about 3,000 pages of competent and material evidence and proceedings, and only about 500 pages of same, scattered through the mass of incompetent and irrelevant evidence, relate to the case of petitioners. The length and detail of the Petition and Brief herein results from assembling and presenting all of the evidence and proceedings which are material to the case of petitioners to the end that the Court may not be required to examine said voluminous record.)

1. Statement of Case 1- 9

Petitioners and Respondents Herein are Interveners 1- 2

The United States Interpled on Behalf of Petitioners and Respondents and Other Restricted Indian Interveners 2- 4

The Assistant United States Attorney, Representing the United States as such interpleader on behalf of Petitioners and others, improperly Acts and Co-

(32582

Page

operates with Attorneys for Respondents in Negotiating, Executing, and Carrying Out a Purported Agreement and Family Settlement and Secures Approval of same by Trial Judge Against Petitioners 5- 9

ers 5- 9

2. Only One Controlling Issue of Fact Was Presented and as to Said Issue There Was No Conflict in the Evidence 10- 19

Statement of Counsel for Respondents as to said Sole Issue 10

Digest of Evidence on behalf of Petitioners and Respondents by Periods of the Lives of Jackson Barnett and his Son, Albert (Barnett) Brady, the Father of Petitioners, Disclosing said Absence of Conflict;

As to Jackson Barnett:

Period of Life of said Jackson Barnett from 1852, Approximate date of his Birth until 1865, When about 12 years of Age 10- 11

Same for Period 1865-1872, While said Jackson Barnett Lived at the Home of Billy (William) McCombs 11- 12

Same for Period from 1872 to 1875, Age 20-23, When Jackson Barnett Lived at and in the Vicinity of the Home of Judge Colbert, and Albert Barnett, Afterwards Known as Albert Brady, the Son of said Jackson Barnett and Cinda Colbert was Born 12- 13

Same From 1875 to 1891, Age 23-39 Years, When said Jackson Barnett Lived at or in the Vicinity of John Leecher (Leecher's Ferry).. 13

Page

Same for Period From 1891 to 1934 (Age 39 to 82 Years), During which He Stayed from Place to Place in Senora, later Bryant, Siah Barnett Neighborhood, until Taken to California Where he Died 13- 14

As to Albert Brady:

Period of Life of Albert (Barnett) Brady, date of Birth, to 1876 When Jackson Barnett and Cinda, His Parents, separated 14- 15

Same for Period From 1876 to 1895, Age Approximately 1 to 20 years, When Albert Brady Lived with His Mother's Relatives 15

Same for Period From 1895 to 1897, Age Approximately 21 to 23 Years when He Lived with Alice Fox, and Lucinda Watashe, Formerly Brady, a Daughter, was Born to Them 16

Same for Period From 1898 to June, 1922, Date of Death of Albert Brady, Age 23 to 48 Years, During which He Married and Lived with Mary Fisk, and Petitioner, Dora Brady, was Born, and Albert Brady Visited and was Visited by said Jackson Barnett, his Father 16- 18

3. The Filing of Petition and Affidavit to Disqualify the Trial Judge, and Amendments Thereto, and the Erroneous Proceedings in the Denial of Same ..18- 22

First Knowledge or Information of Petitioners and Counsel of Participation of Trial Judge in Negotiation, Approval and Carrying Out of Agreement or So-called Family Settlement Received Only 2 Days before said Petition and Affidavit to Disqualify was Filed 18- 20

Page

Petition and Affidavit to Disqualify set forth Verbatim the Record of the Acts, Doings, Charges and Threats of said Trial Judge 20- 21

Trial Judge Directed Counsel for Respondents to File Motion to Strike said Petition and Affidavit to Disqualify 21

The Trial Judge Caused the Truth of said Record Facts Set Forth in said Petition and Affidavit to Disqualify to be put in Issue and Admitted Oral and Documentary Evidence on Hearing Thereof and Found and Concluded that said Record Facts therein Stated Were Not True, and that said Petition and Affidavit to Disqualify were not Filed in Good Faith 20- 22

4. Findings of Fact of Trial Court Contrary to and in the Face of the Uncontradicted Evidence 22- 31

5. Two Purported Conclusions of Law—One Based on Erroneous Unsupported Findings of Fact, and the Other, Irrelevant as Well as Unsupported 31- 32

6. Judgment of the Trial Court 32

7. Appeal from the Judgment of the Circuit Court of Appeals 33

8. Basis of Jurisdiction of Supreme Court to Review Judgment 33- 34

9. Questions presented and Reasons for Allowance of Writ of Certiorari Nos. 1 to 15, Which Specifically Appear in Index to Supporting Brief 34- 35

INDEX TO BRIEF OF PETITIONERS

Page

Statement of Record, Points Presented, Absence of Issue of Fact, and Appendix Hereto 47- 48

Point One: Agreement among respondents, negotiated, executed and carried out through acts, and coöperation of Assistant United States Attorney, the trial judge, officers and representatives of the Departments of the Interior and Justice, and counsel for the respondents, wrongfully employed to secure and did secure the active support and influence of all of said officers in securing the judgment in favor of respondents and against petitioners herein was improper and against public policy 48- 51

Point Two: Having interpled herein on behalf of the United States as the guardian of petitioners and other restricted Indian parties, the said United States Attorney was without authority or right to participate in negotiating, and assisting in carrying out the said agreement, and securing the approval of same by the trial judge, and other federal officers, and thereafter representing said respondents against petitioners and preparing and presenting to and securing the approval by said judge of findings of fact and conclusions of law consummating the said agreement through a judgment in favor of respondents and against petitioners, and said trial judge was disqualified to determine the issues between petitioners and respondents herein.51- 54

Points Three and Four: On account of said above participation in the execution, approval and carrying out of said agreement, the said trial judge became personally biased and prejudiced against petitioners as is clearly evidenced by subsequent repeated, unpro-

Page

voked, unquestioned, hostile, oppressive, threatening acts and charges against petitioners, petitioners' counsel and witnesses during the purported hearing herein; that said actions on the part of the trial judge were fully set forth in a petition and affidavit to disqualify said trial judge duly and timely filed herein; that said trial judge on account of the above was disqualified to hear, try and determine the issues and render a judgment herein, and that the Circuit Court of Appeals erred in overlooking the above and according to the said proceedings and judgment the presumption, weight and consideration due such proceedings by a qualified judge 54- 111

Unquestioned facts set forth in said petition and affidavit to disqualify trial judge showing personal bias and prejudice:

In Examination of Wade Kilcrease 56- 60

In Examination of Robert Kelley 60- 69

In Examination of Thompson Colbert 69- 75

In Examination of Dora Brady 75- 79

In Examination of Sim L. Liles 79- 83

In Examination of Mary Davis 83- 89

In Examination of Hugh Hale 89- 90

In Examination of Lucille Hiatt 90- 93

In Examination of R. C. Mason 93- 96

In Examination of Alice Fox 96- 102

Point Five: The trial judge exceeded jurisdiction in requiring counsel for respondents to put truth of facts stated in petition and affidavit to disqualify and good faith of petitioners in filing same in issue, and admit-

Page

ting evidence on said issues and finding and concluding that said stated facts were untrue and that said petition and affidavit were not filed in good faith, and the Circuit Court of Appeals erred in overlooking said erroneous proceedings, and the lack of jurisdiction of the trial court therein and in according said proceedings, findings, conclusions, and judgment the presumption and weight of those of a qualified judge 112- 122

Point Six: That it is obvious from an examination of the petition and affidavit to disqualify that the facts as to the said actions and charges of the trial judge which are set forth verbatim and in full therein, and that the same are not stated in the form of conclusions and were duly and timely filed 122- 123

Point Seven: That the trial judge and the Circuit Court of Appeals overlooked and failed to apply to petitioners' cause the well-recognized rule that the findings and statements in the enrollment record of a Creek Indian as to the identity of the parents of said enrollee are presumed to be true unless overthrown by strong, clear, cogent and convincing proof 123

Point Eight: The Circuit Court of Appeals overlooked the rule that only endorsements on the census card of enrollees which relate to the identity of the enrollee are admissible in evidence 124

Point Nine: The trial judge in finding and concluding that there was no evidence that Jackson Barnett and Cinda Colbert, the parents of Albert (Barnett) Brady, were married, and likewise finding the same as to Albert Brady and Alice Fox, the parents of petitioner, Lucinda Watashe, overlooked the presumption under

Page

controlling decisions that said offsprings were legitimate where the enrollment record stated the identity of the parents 124- 125

Point Ten: Under the proceedings and judgment herein it is clear that this court has jurisdiction to review same by writ of certiorari 126-130

Point Eleven: The trial judge overlooked, ignored or disregarded all the evidence on the part of all the parties, and the admissions, and stipulations in making findings of fact herein, and the Circuit Court of Appeals overlooked and did not refer to, discuss or decide the Point 130- 141

Point Twelve: The finding that Jackson Barnett was an incompetent, and without sufficient mental capacity to enter into a valid marriage contract is contrary to the evidence 142

Point Thirteen: The legitimacy of Albert Brady and petitioners on account of lack of evidence of marriage of parents or grandparents may not be attacked herein 142- 143

Point Fourteen: Findings of fact indicate personal bias and prejudice against petitioners 143- 145

AUTHORITIES CITED

Atwater v. Sellers, 239 N. W. (Neb.) 629 49

Barnett v. Equitable Trust Co., 121 Fed. (2d) 375.... 111

Berger v. United States, 255 U. S. 35, 41 S. Ct. 230, 65 L. ed. 481 .....119, 120, 127

Brown v. First National Bank, 27 N. E. (Md.) 158.... 49

Page

Carter Oil Co. v. Scott, 12 Fed. (2d) 780 125
Chetwood, In re, 165 U. S. 443, 17 Sup. Ct. 385 126
Church Street Bldg. Corp., In re, 299 U. S. 24, 57 S. Ct. 88 127
Cox v. Colbert, 35 Okla. 218, 275 Pac. 317 125

Dodson v. McCarnin, 160 N. W. (Iowa) 927 49

Eggleston v. Pantages, 175 Pac. (Wash.) 34 49

Gray v. McReynolds, 21 N. W. (Iowa) 777 49
Gugloz v. Gehrkins, 130 Pac. (Cal.) 8 49

Haskell v. Beartail, 107 Okla. 103, 227 Pac. 392..... 125
Hegler v. Faulkner, 153 U. S. 109, 14 S. Ct. 779, 38 L. ed. 463 125
Hughes v. Kano, 60 Okla. 202, 173 Pac. 447 143
Hunt v. Hunt et al., 23 Okla. 490, 100 Pac. 54 143

Lazenby v. Lazenby, 65 S. E. (Ga.) 120 49
Lewis v. United States, 14 Fed. (2d) (8th Cir.) 369.. 119
Locust v. Caruthers, 22 Okla. 373, 100 Pac. 520..... 125

Malone v. Alderdice, 212 Fed. 668 125
McFarland v. Harned, 115 Okla. 291, 243 Pac. 14 125
McGugin v. United States, 109 Fed. (2d) (10th Cir.) 94 111
Morris v. United States, 26 Fed. (2d) (8th Cir.) 444 113
Mott v. United States, 283 U. S. 747, 51 S. Ct. 642, 75 L. ed. 1385 111
Mowdy v. Leeper, 122 Okla. 16, 250 Pac. 432 125

Nation v. United States, 14 Fed. (2d) (8th Cir.) 507.. 120

Page v. Atkins, 86 Okla. 290, 209 Pac. 807 125
Palmer v. Replogle, 152 Okla. 140, 4 Pac. (2d) 30 125

Quercia v. United States, 289 U. S. 466, 53 Sup. Ct. 698 127

Ridenbaugh v. Young, 46 S. W. (Mo.) 956 49
Ross v. Ross, 175 Okla. 633, 54 Pac. (2d) 611 143

Page

Shields v. United States, 273 U. S. 583, 47 S. Ct. 438 .. 126

Turner v. United States, 14 Fed. (2d) (8th Cir.) 360 128

United States v. Beatty, 232 U. S. 463, 467, 34 S. Ct. 392, 58 L. ed. 686 128

United States v. Mott, 37 Fed. (2d) 860 111

United States v. Wildcat, 244 U. S. 111, 61 L. ed. 1024, 37 S. Ct. 561 125

Yaholar v. Autry, 156 Okla. 257, 10 Pac. (2d) 676 125

TEXT AND REFERENCE BOOKS

17 C. J. S. Contracts, Sec. 223, page 594 49

33 C. J., Sec. 20, page 438, Sec. 47, page 459 53

33 C. J., Sec. 180, page 1014 117

Hughes Federal Practice, V. 8, Sec. 6283, page 533 128

6 R. C. L. Contracts, Secs. 157-158, page 751 49

15 R. C. L. 226 53

STATUTES

Section 25, U. S. C. A., Sec. 21 Judicial Code 112

Section 240, Judicial Code, Sec. 347, U. S. C. A., tit. 28 127

Section 262, Judicial Code, 28 U. S. C. A., Sec. 377.... 127

Section 677, O. S. 1931 143

NO. .....

In the Supreme Court of the United States

OCTOBER TERM, 1941

DORA BRADY and LUCINDA WATASHE,
Peitioners,

VERSUS

ANNIE BEAMS; MELVINEY BARNETT DITZLER; THE ESTATE OF NELLIE BARNETT, Deceased; ESTATE OF JIMMIE BARNETT; MAHALEY FISH HICKMAN; WINEY FISH LEWIS; KATIE FISH LITZEY; FRAZIER FISH; MILLIE FISH GILROY; CHARITY BUCKLEY SMITH; WILLIAM FISHER; FRANCIS SUTTON, *nee* FISHER; MARIAN STEPHENS; LAURENCE H. FISHER; MARIAH FISHER TOMPKINS; LEWIS FISHER; ROSA FISHER; SUSIE CONNER; Heirs of Emma Burgess, Husband, For Himself and as Next Friend of His Minor Children: WILLIAM BURGESS, LITTLE JOHN BURGESS, SISSIE BURGESS, NOAH BURGESS, and JOE BURGESS; MAY (HANNAH) CONNER; WYNIE CONNER HENDRIX; REBECCA J. BAKER; KATIE WILLIAMS, *nee* KNIGHT; Heirs of Lois Williams, Deceased; M. L. WILLIAMS; JOHN F. DAVIS; LUCY KNIGHT; EMMA BEAR; ABBIE COSAR, *nee* CONNER; NETTIE BEAR, *nee* CONNER; WILLIE CONNER; JOHN CONNER; CHISSIE STEPNEY, BARNEY STEPNEY; RHODA GOUGE; IDA GOUGE; and ELIZA GOUGE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT TO REVIEW A JUDGMENT AFFIRMING THE JUDGMENT OF THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF OKLAHOMA AND SUPPORTING BRIEF

Come now the petitioners, Dora Brady and Lucinda Watashe, duly enrolled restricted Creek Indians, and state

that petitioners *and respondents* are interveners in the consolidated action herein involved in which the numerous parties seek the determination of the heirs to and the distribution of the restricted estate of Jackson Barnett, a deceased duly enrolled fullblooded Creek Indian *and in which a judgment has been heretofore rendered in favor of the respondents and against these petitioners, and an appeal had therefrom to the Circuit Court of Appeals and said judgment erroneously affirmed and the review of which judgment is herein sought.* Two of the three actions herein consolidated were filed in the County and District Courts of Muskogee County, and the third in the District Court of McIntosh County, Oklahoma, seeking the appointment of an administrator for the said estate, the determination of the heirs and the distribution of the property of the said estate. Notices of the filing of the said actions in the said State Courts were served on the United States Attorney for the Eastern District of Oklahoma, and upon the application of the said United States Attorney, said actions were duly transferred and removed from said State Court to the United States Court for the Eastern District of Oklahoma, wherein said actions were consolidated and entitled and numbered—*In the Matter of the Estate of Jackson Barnett, Deceased,* No. 4556 Equity.

That said United States Attorney, through his assistant, Charles W. Miller, representing the United States, duly filed in the said consolidated action on behalf of the United States, its interpleader on behalf of and as guardian of all the restricted Indian heirs of Jackson Barnett, deceased,

among which were these petitioners, Dora Brady and Lucinda Watashe. Said petition recited the material facts as to Jackson Barnett and his estate and the status of this proceeding and all the then parties and interveners herein and further stated that other persons were claiming to be the heirs of said Jackson Barnett, and that the United States as **"intervener files this, its petition of intervention herein as guardian of its restricted wards, who may by this court be adjudged to be the heirs at law of the estate of the said Jackson Barnett."** (Pp. 81, 82, Vol. 1, Cl. Tr.) The said attorney filed herein an amended and supplemental petition of intervention of the United States of America, wherein the allegations of the prior petitions were plead and in addition thereto the plea of *res judicata* alleged against any and all claims of Anna Laura Lowe, who was not a restricted Indian, based upon final judgments and decrees theretofore rendered in Federal Courts of competent jurisdiction. The said intervention petitions prayed **"that the court determine who are the true and lawful heirs of said Jackson Barnett, deceased, and distribute said estate to the rightful heirs as their respective interests may appear; that the claimants who are restricted Indians may have the protection to which they are entitled; that the United States of America be protected by final decree in its rights and duties with respect to said restricted Indians and their restricted property."** (P. 342, Vol. 1, Cl. Tr.) That in addition to the original parties to said original actions so consolidated numerous parties, including these petitioners, were permitted to file interventions and to be made parties.

The court permitted the United States to so interplead. Thereafter on June 30, 1936, three certain groups of claimants to heirship to the said estate, being the respondents herein (referred to as the Fisher, Connor and Gough groups) entered into a purported **"Contract and Family Settlement," among themselves and against all other claimants to heirship herein, and in which, among other things, it is stated and agreed** "that other claimants in the suit were related so remotely to said decedent as not to be entitled to inherit from him," and that "the parties hereto are unable to forecast with any degree of certainty which of the said parties hereto will be found and adjudged the next of kin to Jackson Barnett and entitled to prevail over the others," and "that it will be to their best interest for them to unite in their efforts to contest and defeat each of said other claimants, and not to oppose each other, and that in so doing they will not only protect their own legitimate interest, but will also promote the ends of justice and facilitate an early conclusion of this litigation," and to share all future expenditures in the prosecution of their said claims. (Pp. 481, 492, Vol. 1, Cl. Tr.)

That the attorneys of the said groups, respondents herein, deeming it desirable to secure the aid of the said Assistant United States Attorney in negotiating and obtaining the approval of the said contract and agreement by the judge who at the time had been assigned to hear and determine said action, the Attorney General of the United States, the Solicitor for, and the Secretary of the Department of the Interior wrongfully induced said Assistant United States

Attorney, without notice to or the knowledge of petitioners to so act and to then contact the said judge and other named federal officers in behalf of said respondents, and against the legal rights of these petitioners, and to secure the approval by the said judicial and administrative officers of the said "contract and agreement" to the end that the success of respondents in this action could not fail of consummation.

That the Assistant United States Attorney, so appearing for the United States, as interpleader on behalf of all restricted Indian Claimants, including these petitioners, secretly, wrongfully, improperly and collusively so abandoned his neutral position in October, 1936, five months before this action was called for trial, and purporting to represent the United States, as such interpleader, after contacting and securing *the concurrence of the said judge,* Honorable ROBERT L. WILLIAMS, actively assumed the lead in inducing the Attorney General and the Secretary of the Interior Department of the United States to approve and carry out the said compromise agreement or family settlement as is evidenced by letter written by the said Assistant United States Attorney to said Attorney General on October 13, 1936, as follows:

> "• • • During the past eighteen months some 6,000 pages of depositions have been taken. [No depositions had been taken by these petitioners and no depositions had been taken in opposition to the claim of these petitioners.] From the information adduced in these depositions and from other information available to me, I am of the opinion that the three groups named in the con-

tract are the proper heirs of Jackson Barnett and should inherit his estate. It appears that Siah Barnett was the father of Jackson Barnett, and his descendants are represented by Group No. 1. [Part of these respondents.] There is no question as to who was the mother of Jackson Barnett, she was Thlesothle. Groups No. 2 and No. 3 [the remainder of the respondents] are composed of the descendants of Thlesothle and are referred to as the maternal claimants. There is a controversy among some of these claimants as to which ones are the nearest of kin of Jackson Barnett, but as descendants of the mother it seems to me that it would be only equitable and just that they should all come in and share, regardless of whether they are cousins or nephews.

"Again, there is a contention between groups 2 and 3 on the one hand, and group No. 1 on the other, as to the legitimacy of Jackson Barnett and as to the validity of the marriage between Siah Barnett and Thlesothle. The evidence shows [depositions on behalf of said group No. 1 in which these petitioners were not concerned] that Siah Barnett took Jackson Barnett into his home and recognized him as a child, and these claimants are the descendants of Siah Barnett and they should not be cut out by the legal technicality of the validity of a marriage nearly a hundred years ago in this unsettled country. It seems to me that it is good policy to divide this large estate among as many full-blood Indians as possible, provided, of course, they are blood kin of Jackson Barnett and entitled to inherit.

"Thus far in the conduct of this case I have taken no positive stand for or against any individual claimants. *I have taken the position that the Government is a stakeholder and ready to pay out the money to those whom the court may find to be entitled thereto.* It was my desire to have the case develop from step to step, to

give every claimant a full and free opportunity to present the evidence in support of his claim, and to see that justice was done. [The case had not been set for trial and no evidence had been presented. This letter was written October 13, 1936, and the trial of this cause began on March 22, 1937. Why the hurry of taking this secret action more than five months before the trial opened?] *This largely because, at the inception of the case, I did not know and no one knew who were the heirs of Jackson Barnett.* However, the case had advanced to the point where I believe this office would be justified and that it is my duty to take the position that the groups mentioned in this agreement are the proper heirs of Jackson Barnett. With this in view, it is my opinion that the approval of this agreement not only would not embarrass the United States, but would materially assist in properly presenting the claims of these full-blood Indians." (Pp. 499, 500, V. 1, Cl. Tr.)

That the then Attorney General of the United States was in that manner induced by the said Assistant United States Attorney to lend his approval and aid in the execution and consummation of the said contract is evidenced by the following quotation from an opinion prepared for the Secretary of the Interior, dated December 14, 1936:

"It has been suggested that the contract may be against public policy, but it is not entirely clear that this is true. **The United States Attorney in charge of the litigation has stated his approval of the contracts and has also discussed the matter with the United States District Judge. The latter (the trial judge) has indicated his view that the contract probably would not be against public policy. Considering all of the circumstances, and since the arrangement proposed is not a secret one and is subject to approval by several courts,**

it would appear that you are under no compulsion to withhold your approval of said agreement because of a mere doubt. The parties are entitled to a presumption of legality and ought to be accorded their day in court upon this issue, if raised by any interested party." (Pp. 498-499, V. 1, Cl. Tr.)

From the above-quoted statement of the Attorney General his belief was that the said Contract and Family Settlement was not a secret one, and that the claimants, who were not parties thereto, could protect themselves against prejudice and compelling influence resulting from the consummation of the agreed plan. This belief on the part of the Attorney General that the actions so taken and the part so played by the Superintendent of the Five Civilized Tribes, the Assistant United States Attorney, the Trial Judge, the Attorney General, the Solicitor and the Secretary of the Interior, all representing the United States, interpleader herein on behalf of all restricted Indian claimants, was not secret and was known to all other claimants, and that such claimants could protect their interests against such combined influence, was erroneous as to the petitioners, Dora Brady *et al.*, and their attorneys. That the record shows and the facts are not denied that the petitioners had no knowledge of said acts and doings on the part of the said Assistant United States Attorney, the Trial Judge, and the administrative officers of the United States Government until June 16, 1938, approximately three months after petitioners had presented their evidence herein, but before the presentation of evidence on part of claimants was concluded herein. (Pp. 512-546, V. 1, Cl. Tr.)

ONLY ONE CONTROLLING ISSUE OF FACT INVOLVED

That at all times it was understood and accepted by and between the petitioners and the respondents that the controlling question or issue of fact was as to whether or not the Jackson Barnett, who was the father of Albert Brady (Barnett), and the grandfather of petitioners, was the Jackson Barnett whose heirs are being determined in this action. That this is true is evidenced by the fact that on page 156, Volume II, appellees' (respondents here) answer brief in the Circuit Court of Appeals herein states the sole issue of fact as follows:

> "The sole question presented by this appeal is: Was the Jackson Barnett whose name appears on the final enrollment records of the Creek Nation as the father of Albert Brady, the same person as the Jackson Barnett whose heirs are to be determined in this litigation."

That the evidence on the part of the petitioners, Dora Brady *et al.*, and the respondents, Annie Beams *et al.*, and on the part of all the other parties to this action, except the Kentucky and Tennessee claimants, which evidence is hereinafter digested, without material conflict, establishes the fact that the Jackson Barnett whose heirs are being herein determined was the Jackson Barnett who was the father of Albert Brady, and the grandfather of these petitioners.

STATEMENT OF PROCEEDINGS, MATERIAL FACTS, AND SUPPORTING EVIDENCE

That on the 16th day of March, 1938, the petitioners, Dora Brady and Lucinda Watashe began, and on the next day concluded, the presentation of evidence in the trial court in support of the allegations of their intervention herein that petitioners were the daughters of Albert (Barnett) Brady, deceased, who was the son of Jackson Barnett, deceased, whose heirs are being determined in this consolidated action, and Sinda Colbert, who married and lived together according to Creek Indian custom from approximately 1873 to 1875, and that petitioners are the sole heirs of the estate of Jackson Barnett and entitled to take and have distributed to them as such heirs the property of said estate. That said evidence appears in Volumes 10 and 11, pp. 4715 to 5000; Vol. 11, pp. 5001 to 5008, Reporter's Transcript herein, and is not contradicted as to any material fact. That the evidence on the part of the respondents in no material particular conflicts with the said evidence on the part of these petitioners, and in only one immaterial particular is there any conflict in the evidence, as will appear in the brief in support of this petition. That the substance of the unchallenged evidence in the Record, stated by periods in the life of said Jackson Barnett and Albert (Barnett) Brady, is in substance as follows:

1. That said Jackson Barnett, the decedent, admittedly enrolled as a fullblood Creek Indian, Tuckabatchee Town, No. 4524, Creek Census Card No. 1419, was born in approximately 1852 in the Creek Nation in the vicinity of Old Tuckabatchee, sometimes referred to

in the evidence as Buzzard Hill, Shell Creek, the Court House of the Creek Eufaula District, Tuskegee Baptist Church, just north of the South Canadian River, near the present town of Hanna; all some 6 to 10 miles west of the present location of the town of Eufaula, Oklahoma; and lived with his mother, Thle-so-thle, in that locality until approximately 1861, beginning or first part of the Civil War; that upon her death, Jackson Barnett was left in the keeping of his Aunt Jennie and Uncle Jeffry, and they subsequently left him at the home of Wm. (Billy) McCombs.

Wm. Fisher's Ex. 1: (Census card) States Jackson Barnett was born in 1852. V. 3, Reporter's Transcript, P. 1255, V. 6, Pp. 2677, 2705, 2809; V. 4, Pp. 1587 to 1590.

The above unchallenged statements of fact are established by the evidence in the record as follows:

Reporter's Transcript

Vol. 3, 1328-1329, 1330, 1334, 1355, 1445, 1456, 1462, 1464, 1477, 1468; Vol. 4, 1541, 1544, 1546; Vol. 5, 2137-2138; Vol. 6, 1836, 2842, 2844, 2845; Vol. 8, 3693, 3708, 3709, 3768, 3791, 3827, 3828, 3837, 3838, 3840, 3847, 3849, 3887-3888; Vol. 11, 5048-5049, 5050, 5337-5338, 5048-5049; Vol. 19, 9227, 9236, 9229-9230; Vol. 25, 13268, 13235, 13236.

PERIOD APPROXIMATELY 1865-1872
(Jackson Barnett's age 13 to 20 years.)

2. Shortly after the close of the Civil War, said Jackson Barnett was left at the home of William (Billy) McCombs, in the Creek Nation about three miles northeast of Old Tuckabatchee and one mile west of Tuskegee Baptist

Church, and lived there until about 1872, and was an average full-blooded Creek Indian boy in the matter of intelligence and habits.

See Reporter's Transcript as follows: Vol. 4, pp. 1529, 1539; Vol. 6, 2669, 2670, 2723, 2725, 2726, 2734, 2739; Vol. 8, 3887, 3888, 3899, 3827, 3828, 3850, 3851; Vol. 10, 5715, 2719, 4722, 4728, 4735, 4736, 4737, 4744, 4745, 4746, 4749, 4757, 4760, 4955, 4956, 4958; Vol. 11, 5337, 5339, 5340, 5341, 5342, 5346, 5351, 5014, 5015, 5020, 5126, 5070, 5095-5097; Vol. 16, 7816, 7827; Vol. 17, 8218, 8214, 8197, 8198, 8200-8202, 8323; Vol. 19, 9259; Vol. 21, 10044, 10045; Vol. 25, 13268-13269, 13206, 13213, 13237, 13218, 13219.

PERIOD APPROXIMATELY 1872-1875
(Jackson Barnett, age 20 to 23 years.)

3. Commencing in approximately 1872 and continuing until approximately 1875, Jackson Barnett lived at the home of Chowee, or Joe Colbert, a full-blooded Creek Indian, at one time Creek District Judge, who lived in the vicinity of old Tuskegee Church, and near the Tuskegee Courthouse, and about one mile from the home of William (Billy) McCombs. In addition to Jackson Barnett, several young Creek Indians of both sexes lived at said home, among them being Sinda Colbert, a niece of said Joe Colbert. In about the year 1872 or 1873, Jackson Barnett and Sinda began living and cohabiting together at said home and elsewhere, and a son, who was named Albert (afterwards Albert Sewell, and finally Albert Brady, the father of Lucinda Watashe, formerly Brady and Dora Brady, petitioners herein) was born to them. Jackson Barnett and Sinda recognized each other as being husband and wife and were so recognized by the family and others, and said

son was accepted and recognized by all as being the son of Jackson Barnett and Sinda.

Reporter's Transcript: Vol. 6, 2723, 2725-2726, 2734, 2739; Vol. 8, 3915; Vol. 10, 4715-4718, 4720, 4721, 4722, 4724, 4726, 4727, 4731 to 4736, 4746, 4747, 4749, 4750, 4751 to 4754, 4764-4766, 4767 to 4769, 4771, 4773 to 4778, 4955, 4956; Vol. 11, pp. 5078, 5095 to 5097.

PERIOD APPROXIMATELY 1875-1891
(Jackson Barnett, age 23 to 82 years.)

4. Jackson Barnett, in approximately 1875, after leaving Chowe or Joe Colbert's home, stayed at least a part of the time at Leecher's Ferry and worked at the said ferry on the Arkansas River, near Muskogee, Indian Territory, until approximately 1891, and thereafter lived for some years in the vicinity of Okmulgee and Henryetta, Oklahoma.

5. That Jackson Barnett, after leaving Leecher's Ferry, vicinity of Muskogee, Oklahoma, became a wandering Indian and what is commonly known as a "Snake Indian," and referred to as "Crazy Jackson," staying from time to time at the homes of Siah Barnett, Josh Asbury, Josiah Looney and others, and finally living alone in a log cabin, all in the vicinity of Senora, later Bryant, in the Hickory Ground area of the Creek Nation, until approximately 1912.

Likewise, all the evidence is to the effect that in about 1912, oil was first produced on the otherwise practically worthess arbitrary allotment which was made to the said Jackson Barnett, and thereafter his estate, and largely his personal control, was taken over by guardians and other persons seeking to profit through his wealth.

His guardian built him a house on part of his land and provided him an attendant. Jackson Barnett remained in said home until he was removed and taken from place to place about the country, largely dispoiled of his wealth, until he finally died in California on May 29, 1934. **One of the consolidated proceedings at bar was filed by members of the three successful groups, respondents herein, in an Oklahoma State Court on the second day, May 31, 1934, after the said death of Jackson Barnett in California, which evidences the fact that due preparation so to do was made in advance.**

Reporter's Transcript: Vol. 1, pp. 20, 28-29, 40-44, 71, 95, 208, 210, 213, 216, 220, 224, 225, 232, 234, 235, 239, 279, 344, 346-348, 350, 351, 353, 354; Vol. 4, pp. 1934-1940; Vol. 5, pp. 2479, 2487; Vol. 6, pp. 2503, 2506, 2510, 2512, 2516, 2523, 2566, 2567, 2568, 2571, 2589, 2595; Vol. 8, pp. 3918, 3919, 3924, 3925, 3923; Vol. 9, pp. 4385, 4392, 4393; Vol. 17, 2131-8132, 8321-8322; Vol. 22, p. 10619.

IN RE: ALBERT BRADY (BARNETT)
(Period Approximately 1874 to 1876.)

6. Albert Brady, enrolled fullblood Creek Indian, No. 5475, a member of Hickory Ground Creek Town, and Deer Clan, taking the town and clan of his mother, Sinda, was the father of appellants, Lucinda Watashe and Dora Brady, was born in about 1874, at or near the home of Chowee or Joe Colbert, the uncle of Sinda, the mother of said Albert Brady. Jackson Barnett and Sinda were the parents of said Albert Brady (Brady Exhibit Nos. 5 and 6) and said parents lived at or near said Colbert's home until said Albert was from 1 to 2 years of age, when Jackson Barnett left and went to Cain Creek on the Arkansas River, location of Leecher's Ferry, and Sinda then took Albert to the home of her brother.

Brady's Exhibit No. 7, being affidavit for marriage license, dated February 17, 1898, stating Brady's age at 23, and that *Jackson Barnett and Lucinda (Sinda) Colbert, were his parents.*

Fisher's Exhibit No. 20 states age in 1896 as 22 years and year of birth 1874 and *Sinda* to be mother and *Charley Barnett* to be the father of Albert Brady. *This error as to the name of father was corrected* later by the Dawes' Com., and stated to be *Jackson Barnett* in Brady's Exhibit No. 5.

Brady's Exhibit No. 5, Creek Census Card, age stated March 6, 1900, 24 years, and states mother to be *Sinda Sewell* ("Sewell," being name of second husband) and his father to be *Jackson Barnett.*

Reporter's Transcript: Vol. 10, pp. 4715 to 4720, 4722, 4724, 4726, 4728, 4730-4731, 4732 to 4736, 4737, 4744 to 4746, 4750-4752, 4757, 4758, 4760, 4762 to 4764, 4766, 4769, 4770 to 4773, 4775, 4866 to 4868.

IN RE: ALBERT BRADY (BARNETT)
(Period Approximately 1876 to 1895.)
(Age from 1 to 21 years.)

7. Albert Brady's mother, Sinda, after she and Jackson Barnett separated, married Parney Sewell, and the mother of Parney Sewell, Salley Mooney, was the wife of Andrew Brady, and Albert was raised in the family of said Andrew Brady and took the name of "Brady." Albert Brady was known and understood by the Sewell and Brady families as being the son of Jackson Barnett and Sinda.

Reporter's Transcript: Vol. 10, pp. 4778, 4779, 4780, 4781, 4782-4783.

IN RE: ALBERT BRADY (BARNETT)
(Period Approximately 1895 to 1897.)
(Age 21 to 23 years.)

8. Albert Brady lived with Alice Fox and Brady's Exhibit No. 10, being Census Card No. 503, Field No. 505, dated June 20, 1899, shows Alice Fox and Albert Brady to be the parents of Lucinda Brady now Watashe; that Albert Brady was a member of Hickory Ground Creek Town; that Alice Fox was a member of the Tuskegee Creek Town; that said Lucinda Watashe is No. 1641 on the Dawes Creek Roll and was three years of age in June, 1899.

Reporter's Transcript: Vol. 10, pp. 4995-4996, 4998-5003, 5004-5008.

IN RE: ALBERT BRADY (BARNETT)

(Period Approximately 1898 to June, 1922, Date of Death, 23 to 48 years of age.)

9. Albert Brady and Mary Fisk were married on February 28, 1898, and on September 17, 1899, Dora Brady, a daughter, was born to them, and on April 22, 1902, the enrollment of said Dora Brady as the daughter of said Albert Brady and Mary was approved by the Dawes Commission. In affidavit by Albert Brady for marriage license, dated February 17, 1898 (Brady's Ex. No. 7), said *Albert Brady states that the name of his father is Jackson Barnett, and the maiden name of his mother, Lucinda Colbert.*

Brady's Exhibit No. 5, being Census Card 1701 (Fisher's Exhibits 19 and 23) shows Albert Brady to be the father of Dora Brady, and that Jackson Barnett is the father of Albert Brady.

Albert Brady, in about 1900, took allotment for himself and daughter, Dora Brady, near Bristow, Okla-

homa, and lived thereon until his death in June, 1922. He, from time to time, visited and was visited by his father, Jackson Barnett, and he made the identity of his said father, Jackson Barnett, known to his friends and tenants. After 1912, when the said Jackson Barnett became wealthy on account of oil royalties from his arbitrary allotment, Jackson Barnett lost his freedom of movement on account of the supervision of his guardians and others who suddenly became interested in his affairs; however, Albert and Dora Brady did not lose interest in their said parent and grandparent, Jackson Barnett, as is fully shown by the evidence of their friends and neighbors with whom they conversed, and the trial court was not justified in his condemnation and finding (p. 714, V. 2, Cl. Tr.) that said Albert and Dora Brady failed to come to his relief and protect him from his guardians and federal agents as is shown by the evidence hereinafter recited.

Brady's Exhibit No. 5 (being same as Fisher's Exhibits Nos. 19 and 23) erroneously recites that Jackson Barnett, the father of Albert Brady, was a member of Hickory Ground Town. That this recital is erroneous is conclusively shown by the following:

Brady's Exhibit No. 8, being a certificate signed by A. G. McMillan, assistant superintendent of the Five Civilized Tribes, and which certifies:

"* * * that I have made a thorough and complete examination of each and everyone of the Creek Tribal Town Rolls of the Creek Nation of Hickory Ground Town for the years 1858, 1859, 1867, 1882, 1890 and 1895, and find that there is no person named Jackson Barnett enrolled thereon; that the above named rolls compose the whole and complete Creek Tribal Records, showing the enrollment of the members of Hickory Ground Town during the above mentioned preiods as

are on file in this office and compiled by the Creek Tribal Officials."

The above statement of facts is established by evidence in the record as follows:

Reporter's Transcript: Vol. 10, 4925, 4964-65, 4787 to 4799, 4800, 4801, 4807, 4812 to 4816, 4818, 4819, 4822 to 4824, 4826, 4827, 4838 to 4843, 4845 to 4848, 4857 to 4859, 4870, 4871, 4878 to 4882, 4884, 4890 to 4899, 4900, 4904 to 4906, 4908, 4909, 4915 to 4917, 4921, 4922, 4982, 4983, 4985, 4986, 4987, 4991 to 4995; Vol. 18, pp. 8651 to 8655.

THE FILING OF PETITION AND AFFIDAVIT TO DISQUALIFY THE TRIAL JUDGE, AND AMENDMENTS THERETO, AND THE ERRONEOUS PROCEEDINGS IN THE DENIAL OF SAME

That immediately following the said attempt to present evidence on behalf of these petitioners, the judge recessed the hearing until June 20, 1938. During said recess and on June 11, 1938, a copy of the said "contract" and "family settlement" and the correspondence between said Assistant United States Attorney and the officers of the Departments of Justice and Interior, and a statement of the acts and doings of said parties, including the trial judge, and counsel for the respondents in relation to the said "contract" and "family settlement" were filed in this cause in connection with and as exhibits to an affidavit of Lucy Curns *et al.* to disqualify said trial judge from proceeding further in the purported trial of this action.

That 5 days thereafter and on June 16, 1938, information as to said acts and doings of the said parties, first became

known to counsel of petitioners, and though said counsel to said petitioner, Dora Brady, on June 18, 1938, 2 days thereafter, and that the said information as to the said acts and doings of said United States Attorney, the trial judge, representatives of the Departments of Justice and Interior, and attorneys for respondents, considered in the light of the actions and charges of the trial judge theretofore occurring and hereinafter stated, convinced petitioners and counsel for petitioners that a plan and agreement existed on the part of all of the said officers to defeat the claims of all parties herein other than the respondents, and that said concerted attacks upon, threats, and charges against these petitioners, petitioners' witnesses, and counsel, by the said trial judge and counsel for respondents, during the said effort to present evidence on behalf of respondents, were made and perpetrated with the objective of embarrassing and obstructing petitioners in the presentation of evidence of the facts as to the heirs of said Jackson Barnett, and to fatally weaken the evidence in support of the cause of petitioners herein.

That so believing, as above stated, and further believing that the said acts, threats, and charges on the part of the said judge during said proceeding were the result of personal bias in the mind of the said judge against petitioners and in favor of the respondents, who were the beneficiaries under said "contract" and "family settlement," and believing that such bias and prejudice against petitioners was so intense as to completely incapacitate the said trial judge to judicially hear and fairly weigh evidence on the part of petitioners,

these petitioners on June 18, 1938, within two days after said above stated information first came to counsel of petitioners, and on the very day said information first came to petitioners, petitioners filed herein their said petition and affidavit to disqualify the trial judge on the ground of personal bias and prejudice. (Vol. 1, pp. 512 to 517, Cl. Tr.)

That as appears in Exhibits 1 to 9, attached to and made a part of said petition and affidavit to disqualify, petitioners attached exact copies of the stenographic record of said proceedings which set forth the exact language the trial judge and counsel for respondents used in said attacks and threats against petitioners' witnesses and counsel, which occurred prior to said June 18, 1938, and copies of the correspondence and statements of fact in reference to the acts and doings of the Assistant United States Attorney, the trial judge, and the officers of the Departments of Justice and the Interior in relation to the execution and approval of said "contract" and "family settlement." (Vol. 1, pp. 518 to 546, Cl. Tr.) That the matters and things stated in said petition and affidavit to disqualify and in said exhibits are not the statements and conclusions of the petitioners, but are statements of the record showing the particular acts, doings and statements of said trial judge, and counsel for respondents.

That thereafter because of subsequent acts and doings on the part of the said judge and counsel for respondents, during further proceedings, the petitioners amended and enlarged said affidavit to disqualify the said judge so as to set forth in substance that in a proceeding had in said court the good character and morality of petitioner, Dora Brady, al-

though not at issue and not material, was attacked by the trial judge and counsel for respondents. (Pp. 8634-8636, 8651-8654, Vol. 18, Rep. Tr.); that said trial judge wrote a letter, during said proceeding, to J. C. Stone, of counsel for respondents, in which said Stone was requested to make an investigation and report to said judge certain supposedly improper conduct on the part of L. J. Burt and Charles E. McPherren, of counsel for petitioners. (Pp. 1338-1340, Vol. 2, Cl. Tr.). That for a full presentation of the nature and purpose of this letter, see pages 104-106, brief of appellants, Dora Brady *et al.*, No. 2176, in Circuit Court of Appeals and to which counsel for respondents have made no answer or explanation.

That, upon the filing of said petition and affidavits to disqualify, the trial judge directed counsel for respondents to file a motion to strike same (Pp. 1070-1071, Vol. 2, Cl. Tr.); then admitted the whole record in evidence to be considered in passing upon said petition and affidavits to disqualify (p. 1073 same); said counsel then filed a response to said application and affidavit to disqualify, and thereafter said judge overruled said petition and affidavits of petitioners to disqualify on the grounds, among others, that same were not filed in due time; that same were not in due form; *that although same alleged that petitioners did not have knowledge of the facts alleged until about the time of filing same, that the court finds said statement to be untrue, and that the grounds alleged for disqualification were without foundation in truth and in fact.* (Pp. 1185-1189, Vol. 2, Cl. Tr.)

That as appears from the faces of said petition and supporting affidavits to disqualify said judge, the same are in due form in all particulars, *and specifically state the numerous acts and doings on the part of the said judge which evidenced the disqualification of said judge to try and determine this action on account of personal bias and prejudice against these petitioners and in favor of the respondents, and as appears from the unchallenged allegations therein same were filed in due time in that same were filed within 2 days after knowledge of the basic facts became known to petitioners and their counsel.* That as will hereinafter appear, the said trial judge erred in all of said findings and conclusions and in permitting the truth of the facts alleged in the said petition and affidavits to be put in issue, erred in admitting the entire record in evidence on the consideration of said petition and affidavits, and erred in making said findings and conclusions that said alleged facts were not true.

FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE TRIAL COURT

That said trial court made findings of fact and conclusions of law with reference to the cause of petitioners, Dora Brady *et al.*, in substance:

> "1. That [1] neither Albert Brady, Mary Fisk, his wife, nor Dora Brady ever made any effort to cause him [Jackson Barnett] to have any relief, though now it is attempted to be made to appear that they had an interest * * * it was known by them that Jackson Barnett was in distress as disclosed by Exhibit '1' in evidence [p. 714, Vol. 2, Cl. Tr.]; that [2] I failed to find

from a fair preponderance of the evidence that he [Jackson Barnett] ever lived with William or Billy McCombs, or [3] that just after the close of the Civil War and until about 1875 he lived for a period of time at the home of Joe Colbert; or [4] that later he lived for a period of time at the home of John Leecher on the Arkansas River north of Muskogee, Creek Nation, known as Leecher's Ferry." (Pp. 723-724, Vol. 2, Cl. Tr.)

All four of the above findings are in the face of the unchallenged evidence. As to finding (1) with regard to the failure of the family of the petitioner, Dora Brady, to come to the relief of Jackson Barnett, the father of Albert Brady, when mistreated by the representatives of the Interior Department, as is evidenced by said Brady Exhibit "1", obviously said finding is immaterial and is clearly based on the hostile feeling on the part of the judge; however aside from that fact, the evidence shows that Albert Brady and daughter, Dora Brady, were interested in Jackson Barnett at said time and discussed his relationship to them with their neighbors (pages 4817-4818-4819, 4877 to 4882, Volume 10, Rep. Tr.). The other three above findings, as will hereinafter appear, are in the face of the unchallenged evidence, and the admission of counsel of the respondents in their brief filed herein in the Circuit Court of Appeals.

That as to finding (2) in substance that the Court failed to find said Jackson Barnett ever lived at William or Billy McCombs', the same is in the face of all the pertinent evidence presented on the part of respondents as well as the evidence of petitioners and the other parties. This fact is

aptly illustrated by the evidence of Nancy Posey, a witness of high character, presented by respondents, and who in substance testified: That she knew Thlesothle and the Conner family and Jackson Barnett, the son of Thlesothle; that Jennie Conner was a sister of Thlesothle, and the aunt of Jackson Barnett; that when Thlesothle, the mother of Jackson Barnett, died, that Jackson's Aunt Jennie and her husband, Uncle Jeffry, left him to live at the home of William McCombs, and that she saw him there when he was a boy old enough to run errands. This evidence was cited with approval by counsel for respondents and appears on pages 5336-5346, Vol. 11, R. Tr.

That this finding that said Jackson Barnett did not live at the home of Billy or William McCombs is contrary to the evidence of all the witnesses who testified as to the whereabouts and home of Jackson Barnett after the death of his mother, Thlesothle, and before he lived at the home of Joe or Chowee Colbert, and then at the home of John Leecher, is evidenced by the testimony of the following disinterested witnesses:

John A. Jacobs, V. 6, pp. 2669, 2670, R. Tr.; Rebecca J. Baker, V. 21, pp. 10044-10045, same; Nathan Williams, V. 25, pp. 13218-13219, same; Lucy Scott, V. 25, p. 13247, same; Winnie Hendrix, V. 16, p. 7827, same; Taylor Bear, V. 8, pp. 3850-3851, same; Ernest Gouge, V. 4, p. 1539, same; Ellen Smith, V. 19, p. 9259, same; Charlie Barnett, V. 6, pp. 2725-2726, same; Robert Colbert, V. 17, pp. 8214-8218, same; Tom Moore, V. 11, pp. 5014-5015, same; George Scott, V. 17, pp. 8197-8202, same; Wesley Barnett, V. 11, pp. 5020-5021- to 5126, same; Jim Hutton, V. 11, pp. 5095-5097, same; Thompson Col-

bert, V. 10, pp. 4718-4722-4737, same; Wade Kilcrease, V. 10, pp. 4749-4757-4760, same; Lewis Pittman, V. 10, pp. 4758, same; Nancy Posey, V. 25, pp. 5337-5339-5340-5342-5341, same.

That the above comprises all the evidence on this point, and there is no evidence to support the court's said finding to the contrary.

That above finding (3) that the Court failed to find that said Jackson Barnett lived at the home of Joe Colbert until about 1875 is likewise in the face of all the material evidence of witnesses presented on the part of both the petitioners and the respondents and other claimants. That said witnesses were as follows: Charlie Barnett, V. 6, p. 2734, Rep. Tr.; Jim Hutton, V. 11, p. 5097, same; Thompson Colbert, V. 10, pp. 4717-4718, same; Robert Kelley, V. 10, pp. 4764-4767, same; Lewis Pittman, V. 10, pp. 4950-4956, same; who testified that Jackson Barnett, whose heirs were being herein determined, lived at William McCombs' and Joe Colbert's before he went to live at John Leecher's, and no evidence was presented to the contrary.

That said finding (4) that said Jackson Barnett did not later live at the home of John Leecher's on the Arkansas River north of Muskogee, Creek Nation, known as "Leecher's Ferry" is in the face of the admission of counsel during the trial and in their brief filed herein in the Circuit Court of Appeals and is in the face of all the pertinent evidence on the point. That on page 109, Vol. 2, of said answer brief of respondents herein, filed in the Circuit Court of Appeals, it is stated:

"That Jackson Barnett referred to in the above testimony, who stayed at Old Man Leecher's, and who was not married, was the Jackson Barnett whose estate is here involved."

That Jackson Barnett himself testified in a proceeding in the County Court of Okmulgee County, Oklahoma, in May, 1912, some 22 years prior to his death in 1934, that *Albert* had brought him to the court to testify about the execution of a lease, and that he had worked on a ferry run by an Indian about thirty or forty years prior to 1912. That this evidence corroborates the evidence of all other witnesses who testified on the point. (Seaborn Fisher's Exhibit "11," pp. 60-65, being transcript of proceeding.)

2. The trial court further found that said Jackson Barnett was not the father of Albert Brady, and that Albert Brady was a member of the Hickory Ground Creek Town, and that the father of Albert Brady was also a member of the Hickory Ground Creek Town and was dead at the time of the enrollment of Albert Brady and Dora Brady on March 6, 1900, and that the said Jackson Barnett whose heirs are being determined died on or about May 29, 1934, and was a member of Tuckabatchee Creek Town.

The above finding in all of its parts is against all of the evidence on the part of all of the parties, save and except an erroneous recital which appears on the Census Card of Albert Brady (Brady Ex. #5) that his father Jackson Barnett died prior to 1900, and was a member of the Hickory Ground Creek Town. That this recital was erroneous, and that the Jackson Barnett, who was the father of Albert

Brady, was living long after 1900, and visited Albert Brady as late as 1917, and that he was a member of Tuckabatchee Creek Town, and that Cinda Colbert, the mother of Albert Brady, was a member of Hickory Ground Creek Town, and according to the Indian custom, Albert Brady took the Town of his mother, is the uncontroverted evidence of all the witnesses. The evidence of the following witnesses, *being all the witnesses who testified with regard to the facts, is against the said findings and establishes that the Jackson Barnett whose heirs are being herein determined was a member of the Tuckabatchee Creek Town, and the father of Albert Brady, and that the mother of Albert Brady was Cinda Colbert, a member of the Hickory Ground Creek Town, and that shortly after the birth of their son, Albert, Jackson and Cinda separated and Jackson then lived at John Leecher's Ferry, and that after 1900, the said Jackson Barnett and Albert Brady visited together and were recognized by their acquaintances as being father and son until about 1917*:

> Thompson Colbert, Vol. 10, pp. 4721-4722-4723, 4728, Rep. Tr.; Wade Kilcrease, pp. 4750, 4757, same; Robert Kelly, pp. 4766-4767-4770, same; Mary Davis, pp. 4792 to 4795, same; Lucille Hiatt, pp. 4814-4819, same; Mrs. Lee Phillips, 4821-4825, same; Susie Lawson, pp. 4838-4840, same; Lon Hall, 4857-4861, same; Hugh Hale, pp. 4847-4900, same; Della Hale, pp. 4904-4909, same; Jacob Canfield, pp. 4915-4921, same.

That the above uncontroverted evidence, which was presented in part by practically all of the claimants herein, clearly establishes the said admittedly controlling fact that the Jackson Barnett, who was the father of Albert

Brady, was the Jackson Barnett whose heirs are being herein determined.

That said finding that the Jackson Barnett, who was the father of Albert Brady, and the grandfather of petitioners, Dora Brady and Lucinda Watashe, was a member of the Hickory Ground Creek Town is erroneous, and that no Jackson Barnett appears on any of said town rolls, and that no Jackson or Jack appears thereon who could have been the father of Albert Brady, is further established by the certificate of the superintendent to the Five Civilized Tribes having custody of the said rolls (Brady Ex. #8), and by the testimony of J. D. Fulton, the clerk of the said superintendent, and in immediate custody of said rolls (pp. 4925, 4964-4965, Vol. 10, Rep. Tr.), and by the evidence of Jesse McDermitt, Town King of Hickory Ground Creek Town. (Pp. 4968 to 4971, Vol. 10, Rep. Tr.)

That the trial court refused to find any facts as to the places of residence and doings and family relations of said Jackson Barnett from the time of his birth until he was 39 years of age and appeared in the Senora, later Bryant, and Siah Barnett neighborhoods, as the said court was requested to find by these petitioners is evidenced in the record. That had the trial court made any findings whatsoever as to the said period of the life of Jackson Barnett and prior to his attaining the age of 39 years, such findings would necessarily identify the said Jackson Barnett, who was the son of Thlesothle, and was left with his aunt and uncle, the Jeffrys, and then lived at McCombs', then at Colbert's, then at Leecher's Ferry, and then in the Senora, later Bryant, and

Siah Barnett neighborhoods, and then in California where he died, as being the father of Albert Brady.

3-5. That the trial court as the third finding states: "I do not find that Cinda Colbert was married to Jackson Barnett, enrolled as Jackson Barnett, Creek Roll No. 4524," and as the fifth finding states: "I do not find that Jackson Barnett, whose Creek Roll number is 4524, and Cinda Sewell, *nee* Colbert, were living together at the home of said Chowee or Joe Colbert, as man and wife, under the then existing custom in the Creek Nation, nor that they held themselves out to be man and wife and were recognized and treated as such by their associates."

That said two findings are both erroneous, as well as immaterial, for the reason that the rule is well settled by the controlling decisions, hereinafter presented, that where the enrollment record of an Indian (census card) states the names of the parents of such enrollee, "it follows from said recital that the presumption is that said stated parents were married, and that their offspring are legitimate."

9. That the trial court as the only material part of finding numbered Nine, states: "I do not find proof as to marriage of any character between the said Albert Brady and Alice Brady." That this finding is erroneous for the reason stated above in that the enrollment record of Lucinda Watashe (Brady's Ex. #10, p. 4997, Rep. Tr.) states that the parents of said petitioner were Albert Brady and Alice Brady, and the presumption is that said parents were married.

11-12. "I find that Jackson Barnett, Creek Roll No. 4524, whose heirship is being determined in this action, never visited the home of said Albert Brady (Barnett) and was never recognized and treated and introduced and acknowledged by him as his son or that said Albert Brady recognized him as his father.

"The court finds that the said Albert Brady (Barnett) never visited the said Jackson Barnett at different places or that he was recognized and treated and introduced by the said Jackson Barnett as his son."

That these findings are in the face of the undisputed evidence of numerous disinterested witnesses whose evidence is listed under finding No. 2 above, and said finding is unsupported by any evidence.

13. "The court finds that the Jackson Barnett who was the father of the said Albert Brady Barnett was dead on March 6, 1900, and that the said Jackson Barnett, Creek Roll No. 4524, whose heirs are being determined in this action, did not die until May 29, 1934."

That this finding No. 13 is a repetition in part of finding No. 2 above and is in the face of the uncontroverted evidence of numerous disinterested witnesses, whose evidence is in substance stated and referred to above under said Finding No. 2, and no evidence was presented to the contrary save and except the erroneous, as well as incompetent, recital on the Census Card of Albert Brady (Brady's Ex. 5) prepared in 1900.

CONCLUSIONS OF LAW ON PART OF TRIAL COURT

"The court concludes that the said Lucinda Watashe and the said Dora Brady are not the next of kin and heirs of the said Jackson Barnett, Creek Roll No. 4524, whose heirs are being determined herein, and are not entitled to participate as heirs to his said estate in any way. (Vol. 2, p. 728, Cl. Tr.).

"I find from all the evidence in this case introduced on the part of all the claimants that Jackson Barnett, Roll No. 4524, from his youth up had been and was an incompetent (Vol. 2, p. 737, Cl. Tr.); that he was weak-minded, and generally known as 'Crazy Jack', and that he never at any time had sufficient mental capacity to enter into a valid marriage contract. * * *" The court then repeats in part a number of the findings of fact above stated.

That the first paragraph above is an erroneous conclusion that necessarily follows from the above erroneous findings of fact. *That the second paragraph does not constitute a conclusion of law, but is an erroneous finding of fact, and which finding is immaterial, under the admitted record facts, in determining as to whether or not the petitioners, Dora Brady and Lucinda Watashe, are the granddaughters of said Jackson Barnett, and heirs to his estate, as will be presented in supporting brief. That the trial court intended this finding as a conclusion of law is evident, and that the trial court concluded that the cohabitation between said Jackson Barnett and Cinda Colbert, the parents of Albert Brady, was meretricious, and Albert Brady illegitimate, as otherwise the said*

finding or conclusion served no useful purpose. That aside from the fact that the said finding or conclusion is in the face of the evidence as to the mental condition of Jackson Barnett during the period from 1872 to 1875 when said son, Albert Brady, was born (see p. 14 above), the validity of the marriage of Jackson Barnett and Cinda Colbert cannot be successfully attacked in this action, since the well-settled rule is that such marriage would not be void on account of such feeblemindedness or mental incompetency and would only be voidable, and that where same was not attacked during the lifetime of the parents, same could not thereafter be attacked in any proceeding so as to deprive the children of such relationship from inheriting the estate of the father.

JUDGMENT OF THE TRIAL COURT

That although the trial judge was disqualified, as hereinabove stated, the trial court on the basis of the above-stated erroneous and unsupported findings and conclusions made and entered a judgment adjudging the respondents to be the heirs to the estate of said Jackson Barnett and entitled to take same by inheritance and ordered distribution thereof to said respondents.

APPEAL TO AND JUDGMENT OF THE CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

That petitioners duly appealed from said judgment of said United States District Court to the Circuit Court of Appeals, Tenth Circuit, and presented EIGHT POINTS for the consideration and determination of said Court.

That on September 2, 1941, an opinion prepared by Circuit Judge BRATTON was filed and a judgment entered in *Scott* v. *Beams et al.* and four other cases, numbered 2174-2178, reported in 122 Fed. Rep. (2d) 776. That in the said opinion the separate and distinct appeal of petitioners, No. 2176, is only referred to incidentally and several of the controlling points presented therein by petitioners, being distinct and separate from the points presented in said other appeals, were not referred to, discussed, or decided, as will be fully presented in supporting brief hereto. That said oversight and failure to consider and determine the controlling points presented in petitioners' said appeal was presented to the Circuit Court of Appeals in a petition for rehearing, filed on October 2, 1941, and which was overruled on October 10, 1941.

BASIS OF JURISDICTION OF SUPREME COURT TO REVIEW JUDGMENT

That the jurisdiction of the Court is invoked under the provisions of Section 240 of the Judicial Code, as amended, 28 U. S. C. A., Section 347, regulating the issuance of writs of certiorari to review judgments of the Circuit Court of

Appeals, and Sections 249 and 262 of the Judicial Code, 28 U. S. C. A., Section 377 U. S. C. A., providing for the issuance of all writs which may be required for the exercise of the jurisdiction of the Supreme Court, and agreeable to the uses and purposes of law.

QUESTIONS PRESENTED AND REASONS FOR ALLOWANCE OF WRIT

1. Whether, where the Assistant United States Attorney, having interpled on behalf of the United States in this cause to determine the heirs to the said estate of Jackson Barnett, a deceased fullblooded Creek Indian, and acting for the protection of the possession and control of said estate in the Department of the Interior, as well as of the rights therein of such restricted Indian parties, as the Court might adjudge to be said heirs (pp. 81, 82, and 131, 173, Vol. I, Cl. Tr.), it follows that the said Assistant United States Attorney was without legal or moral right or authority to participate in negotiating, executing, presenting, and *securing the approval by the representatives of the Departments of the Interior and Justice, and by the trial judge,* of the so-called "agreement" or "family settlement," entered into on behalf of respondents, as parties to said action, with the purpose and intent of aiding in obtaining in said action a judicial adjudication that said respondents were the heirs to the said restricted estate to the exclusion of these petitioners, Dora Brady and Lucinda Watashe, who are restricted Creek Indians. (Pp. 67-69, Appellants' Brf., Vol. I, Appendix hereto.)

2. Whether the said Assistant United States Attorney, purporting to represent the United States as interpleader on behalf of all restricted Indian parties, including petitioners, had the right or authority, in the execution of the said "agreement" or "family settlement," to secretly represent respondents and thereafter in the trial of this cause to abandon the representation of all such restricted parties, and to represent the respondents as against said restricted parties, and confer with and prepare, and present to the said trial judge for approval, and secure the approval of findings of fact and conclusions of law in favor of the said respondents and against these petitioners in consummation of said "agreement" or "family settlement." (Pp. 652, V. I, Cl. Tr., pp. 79-82 Appellants' Brf., pp. 26-28 Appellants' Answer and Reply Brf., and pp. 2-4 Petition for Rehearing all in Vol. I of Appendix hereto.)

3. Whether the trial judge, after participating in said negotiations preceding the execution and approval of said "agreement" or "family settlement," which had the admitted purpose and intent of aiding the said respondents against these petitioners in establishing their claim to said heirship, and in thereafter permitting the said Assistant United States Attorney to so appear and represent the said respondents in the trial of the said action against these petitioners, and to confer with the said judge in behalf of said respondents, and to present and secure the approval of said requested findings of fact and conclusions of law in behalf of respondents, gravely erred, and on that account was thereafter disqualified to try and determine the issues here-

in as to said heirship. (Pp. 481-492, 512-546, Vol. I, and pp. 748-750, V. II, Clk's Tr. and pp. 68-75 Appellant's Brf., Vol. I, Appendix hereto.)

4. Whether the unquestioned repeated hostile and oppressive acts, statements, threats, and charges on the part of the trial judge against these petitioners, their counsel and witnesses, during the hearing herein, together with the said participation of the said trial judge in the negotiation and approval of said "agreement" or "family settlement," and on account of which conduct counsel for these appellants were finally compelled to refrain from further effort to present evidence on behalf of petitioners, all of which are set forth verbatim in the said petition and affidavit to disqualify said trial judge, were such as to establish the fact that the said judge was personally biased and prejudiced against these petitioners and in favor of the respondents, and divested this proceeding of all the principal characteristics of a judicial hearing, and on that account this proceeding fails to reflect that calm and deliberate consideration of the evidence and judicial impartiality which are consonant with the principles of justice and of due process of law. (Same as above and pp. 4996-5000, V. 10, and 5001-5008, V. 11, Rep. Tr. p. 47, Appellants' Brf., and pp. 42-48, Petition for Rehearing, V. I, Appendix hereto.)

5. That the detailed allegations of specific facts, and the stenographic record of said facts, which are fully set forth in the said petition and affidavit of petitioners herein to disqualify said trial judge, clearly bring the filing thereof within the statutory exception that same be filed prior to

the beginning of the trial, and show that same were filed within three days after the said acts of collaboration on the part of the trial judge and the Assistant United States Attorney in and about the execution, approval, and carrying out of, the said "agreement" or "family settlement," which preceded said trial, first became known to petitioners or their counsel, is the holding in the opinions in controlling federal cases. (Pp. 515-548, V. I, Cl. Tr., pp. 110-117, Appellants' Brf., pp. 29-30, Answer and Reply Brf., V. I, Appendix hereto.)

6. Whether, where it clearly appears from the record that said trial judge required the respondents to put in issue the truth of the record facts alleged and set forth in said petition and affidavit of petitioners as disqualifying said trial judge to try this action on account of personal bias and prejudice against petitioners and in favor of the respondents, and where it further appears from the record that upon the hearing of said petition and affidavit on its merits, the record shows that the trial court admitted and considered voluminous evidence, both documentary and oral, in considering and determining as to the truth of said allegations, and as to the existence of said alleged personal bias and prejudice in the mind of the trial judge, it follows that the said trial court in so proceeding committed error, and that the said trial court exceeded its jurisdiction, *in finding and concluding that the matters and things alleged and set forth in the said petition and affidavit were without foundation in truth and in fact, and that the said petition and affidavit were not filed in good faith, and on that account over-*

ruling same. (Pp. 18-22, Petition herein, *supra;* pp. 1070-1071, V. I, Cl. Tr., and 1185-1189, V. II, Cl. Tr., pp. 109-115, Appellants' Brf., pp. 2-4, Petition for Rehearing, V. I, Appendix hereto.)

7. That the Circuit Court of Appeals in erroneously finding, concluding, and holding in the opinion and judgment herein that the said affidavit of petitioners, Dora Brady and Lucinda Watashe, to disqualify the trial judge on account of personal bias and prejudice "fell far short of stating facts showing bias and prejudice of the court and therefore failed to comply with the requirements of the statute," in that same stated conclusions and not facts, and that the same was not filed until approximately sixty (60) days "after the bias and prejudice of the trial court became apparent," overlooked, among others, the facts, which were specifically set forth in said affidavit in the language of the record, and which in the main consist of quotations from the stenographic record showing the actual conduct, acts, statements, insinuations, charges and threats on the part of the trial judge against petitioners, petitioners' counsel, and witnesses during the attempted presentation of evidence on the part of petitioners, and which record abundantly sustains said application and affidavit to disqualify; that in finding that said petition and affidavit to disqualify was not filed until approximately sixty (60) days after the bias and prejudice became apparent, the Circuit Court of Appeals overlooked the fact that the admitted participation of the Assistant United States Attorney and the trial judge in the negotiation, approval, and execu-

tion of said "agreement" or "family settlement" did not become known to counsel or these petitioners until June 16, 1938, and did not become known to petitioners until the next day, June 17, 1938, and that the said petition and affidavit to disqualify was filed on the following day, June 18, 1938, all occurring within three (3) days, and was accordingly under the controlling authorities filed in due time; that the Circuit Court of Appeals overlooked the fact that the said trial judge, collaborating with J. C. Stone, Esquire, of Muskogee, Oklahoma, of counsel for respondents, during one of the several long recesses of said purported hearing, while in Durant, Oklahoma, wrote said Stone in Muskogee, Oklahoma, a letter in furtherance of what proved to be an unsuccessful effort to secure evidence on which to base a charge that counsel for these petitioners had been guilty of unprofessional and improper conduct through the representation of parties herein whose interests were in conflict and in that manner embarrass and obstruct petitioners in the further presentation of their claim herein; that the Circuit Court of Appeals overlooked the fact that the complete record of said conduct, acts, statements, threats and charges of the trial judge, together with the correspondence and evidence showing the participation of said Assistant United States Attorney and said trial judge in the negotiation, presentation, approval and carrying out of said "agreement" or "family settlement," and the facts showing that these petitioners and their counsel did not learn said facts until two (2) days before the said petition and affidavit to disqualify was filed, were fully set forth in said petition and affidavit, and that the said affidavit does not contain

statements or conclusions, but does contain specific quotations from the unquestioned record which establish the facts. Said Circuit Court of Appeals further overlooked the fact that said affidavit to disqualify was sufficient in form and substance, and that the said trial judge was disqualified on account of personal bias and prejudice against these petitioners, and in favor of the respondents, to try said cause. (Pp. 512-546, V. I, and pp. 1319-1324 and 1328-1340 and 1352-1380, V. II, Cl. Tr., and 8630-8632, 8648, 8651, 8661-8663, V. 18, Rep. Tr., pp. 92-115, Brf. of Appellants, pp. 26-31, Appellants' Answer and Reply Brf., pp. 4-55, Petition for Rehearing herein, V. I, Appendix hereto.)

8. That the Circuit Court of Appeals erred in overlooking, or in disregarding, and not considering and deciding the question as to whether said trial court exceeded its jurisdiction in permitting the joinder of issue on the part of respondents as to the truth of the facts and records set forth in petition and affidavit of petitioners to disqualify said trial judge on the ground of personal bias and prejudice, and in permitting said respondents to present evidence on said issue, and in considering said evidence and finding and concluding in denying said petition that said allegations of fact were in truth and in fact untrue, and that the said petition and affidavit were not filed in good faith. (Pp. 1187-1188, V. II, Cl. Tr.; 109-121, Appellants' Brf.; and 56-59, Petition for Rehearing; V. I, Appendix hereto.)

9. That the said undisputed conduct, acts, statements, insinuations, threats and charges, on the part of the trial judge against these petitioners, which occurred during the

two-day period in which these petitioners undertook to present evidence, and the said prior collaboration between the said Assistant United States Attorney, the respondents, and the trial judge in and about the execution, approval and carrying out of said "agreement" or "family settlement" in favor of the respondents, which occurred prior to said trial and knowledge of which did not come to petitioners or their counsel until June 16, 1938, only two days before said petition and affidavit to disqualify were filed, are sufficient to establish the following:

First: that the mind of the trial judge was so personally biased and prejudiced against these petitioners as to without doubt exclude the possibility of a fair consideration and weighing of evidence presented on the part of petitioners; second, that the said hearing on that account was not a judicial trial in that same "failed to reflect that calm and deliberate consideration of the evidence, and that judicial impartiality which are consonant with the principles of justice and due process of law"; and third, that the Circuit Court of Appeals erred in according to said proceedings the consideration, weight and effect which are properly accorded to those of a qualified and unprejudiced judge. (Pp. 109-115, Appellants' Brf.; pp. 4-54, Petition for Rehearing, V. I, Appendix hereto.)

10. Whether, where it clearly appears from Creek Census Card No. 1701, Field No. 1705 (Brady Ex. 5 and Fisher's Ex. Nos. 19 and 23), being the enrollment record of said Albert Brady, prepared by the Commission, in enrolling Albert Brady in March, 1900, the father of petitioners Dora

Brady and Lucinda Watashe, that Jackson Barnett was the father of the said Albert Brady, it follows that, under the well-recognized rule announced in controlling federal decisions that recital as to the parentage of the enrollee, which appears on the census card (enrollment record) of said enrollee, prepared by the Commission to the Five Civilized Tribes, is descriptive of said enrollee and *prima facie* proof of such stated parentage, and said recital cannot be overthrown, except by clear, cogent and convincing proof to the contrary, and there being no such proof in the case at bar, the said District and Circuit Court of Appeals herein erred in failing to follow and apply the said rule. (Pp. 156-174, Appellants' Brf., pp. 59-61, Petition for Rehearing, V. I, Appendix hereto.)

11. Whether, in considering the right of Albert Brady to enrollment, as a member of the Creek Tribe of Indians, and determining his identity, information as to whether or not Jackson Barnett, the father of Albert Brady, was living or dead at the time of the listing of Albert Brady, or that the said father was a member of any particular Creek Town, were such as is not required as descriptive matter under the provisions of Section 21, of the Act of Congress of June 28, 1898, and on that account such statements were immaterial, and the further reason that the Creek Town to which Albert Brady belonged was controlled by that of his mother, Sinda, and such incidental statements, in the absence of special legislation, are without effect, and are not admissible in evidence. (Same as above.)

12. Whether, where the census card, or enrollment

record, of Albert Brady (Brady Ex. 5), the father of these petitioners, Dora Brady and Lucinda Watashe, which is in evidence herein, recites that Jackson Barnett and Sinda (Cinda, Lucinda) were the father and mother of said Albert Brady, and the census card, or enrollment record, of Lucinda Watashe, formerly Brady (Brady Ex. 10, p. 4997, V. 9, Rep. Tr.), recites that the parents of Lucinda Watashe were said Albert Brady and Alice Fox, it follows from said recital, under controlling decisions, that the presumption is that the said parents of both said Albert Brady and Lucinda Watashe were married, and that the said Albert Brady and Lucinda Watashe were legitimate, and that the findings and conclusions of the trial judge herein, in substance, *that there was no evidence that said stated parents were married, and that Albert Brady and Lucinda Watashe were illegitimate,* are erroneous, and the Circuit Court of Appeals erred in approving said findings and conclusions. (Same as above.)

13. That, as appears from the opinion in said five appeals, being the separate appeal of these petitioners, and the appeals of four other groups, purporting to have been considered and decided together, the Circuit Court of Appeals erred in overlooking or disregarding and failing to consider or decide the above-stated Points, which were pertinent only to petitioners' case, and wherein controlling questions of law are directly presented, and which are bottomed on facts clearly established by unchallenged evidence, and the Circuit Court of Appeals further erred in according, as the said opinion herein shows, to the proceedings, findings of facts,

conclusions of law, and judgment herein of the said disqualified trial judge, the consideration, weight, and effect which are properly accorded to the proceedings, findings, conclusions and judgment of a qualified and unprejudiced judge (p. 782, lower part, first col., 122 Fed. (2d)), and the said Circuit Court of Appeals further erred in failing to conclude and hold in petitioners' said appeal that the proceedings, findings, conclusions and judgment herein had by said judge subsequent to the filing of the said petition and affidavit to disqualify said judge on account of personal bias and prejudice were all in excess of the jurisdiction of said court, and further erred in failing to set same aside, and considering and determining said appeal without regard to said actions on the part of the said disqualified and prejudiced judge. (Pp. 1020-1076, V. II, Cl. Tr.; pp. 89-91, 110-118, Appellants' Brf.; and pp. 10-11, Answer and Reply Brf.; V. I, Appendix hereto.)

14. That all the evidence (pp. 10-18, supra) on the part of the parties relating to the birth, whereabouts, and family relations of the Jackson Barnett, whose heirs are being determined in this action, without conflict, establishes unquestionably that said Jackson Barnett was born near Buzzard Hill, Creek Nation, in about 1852; that he lived with his mother, Thlesothle, in that vicinity until the beginning of the Civil War; that his mother died during or about the close of said war; that his Aunt Jennie and Uncle Jeffrey, when he was big enough to run errands, left him at the home of Billy (William) McCombs; that when about grown he lived at the home of Judge Colbert, together with several

young Creek Indians, among them Sinda Colbert, the niece of Judge Colbert; that Jackson Barnett and Sinda lived together and Albert (Barnett) Brady, father of petitioners, Dora Brady and Lucinda Watashe, was born to them in about 1874 or 1875; that, when Albert was about one year old Jackson Barnett and Sinda separated; that Jackson went to live and work at Leecher's Ferry, and Sinda, taking Albert, went to live with her brother; that said Jackson Barnett then lived at Leecher's until about 1891 when he was about 39 years old, and began living about in the Senora, later Bryant, Siah Barnett neighborhoods; that later he was kidnapped by Annie Laura Lowe, a white woman, and was taken by her to live in different places in Oklahoma, Kansas and California, until he died in Los Angeles, California, in 1934. That the above conclusively established state of facts determines the admittedly-controlling fact of the identity of the Jackson Barnett, who was the father of Albert Brady, and the grandfather of petitioners, Dora Brady and Lucinda Watashe, as being the Jackson Barnett, whose heirs are being herein determined, and that the trial court erred in refusing to so find and the Circuit Court of Appeals erred in affirming said refusal.

15. That the first finding of purported fact on the part of the trial judge herein is "that neither Albert Brady, Mary Fish, his wife, nor Dora Brady ever made any effort to cause him [Jackson Barnett] to have any relief, although now it is attempted to be made to appear that they had an interest * * * it was known to them that Jackson Barnett was in distress as disclosed by Exhibit 'I' in evidence." (P. 714, V. II, Clk's Tr.) Aside from the bitter nature of this

finding, the said finding is in the face of the unquestioned evidence of a number of witnesses, who were neighbors of Albert Brady, during the period of time referred to, and testified that Albert Brady and Dora Brady, the petitioner, from time to time discussed the situation of said Jackson Barnett, their interest in and relationship to him. (Pp. 4817-4818, 4877 to 4882, V. 10, Rep. Tr., and pp. 11 to 19, **supra.**)

Wherefore, premises considered, the petitioners respectfully pray the Court to grant a writ of certiorari for the review of the judgment and proceedings herein, and that said judgment and proceedings be set aside and vacated, and that petitioners be granted the relief to which petitioners are entitled.

. . . . . .

CHAS. E. MCPHERREN,
442 Key Building,
Oklahoma City, Oklahoma,
Attorney for Petitioners.

December, 1941

BRIEF OF PETITIONERS IN SUPPORT OF PETITION

(Index hereto follows Index to Petition, *supra.*)

Because of the fact that the record of the evidence, proceedings, orders, and repetitious findings and conclusions in the trial court is enlarged and burdened (a) with more than 8,000 pages of purely incompetent, irrelevant, and immaterial evidence, largely consisting of depositions, which were not read in evidence, but were ordered to be considered in evidence; and with (b) approximately 1,000 pages of orders, findings and conclusions, partaking of the nature of arguments and briefs, usually ranging in length from 10 to 285 typewritten pages; and (c) a large part of the remainder of said record related to issues solely between collateral kindred of the said Jackson Barnett, with which evidence and proceedings, the petitioners herein are not concerned, being granddaughters and direct descendants of Jackson Barnett; and (d) only approximately 500 of the many thousand pages of said record have any relation to the case of petitioners, or to the merits of this Petition for Certiorari, and with the purpose of saving the Court the time and labor of examining said unduly voluminous record, counsel for petitioners have undertaken in the petition, *supra*, and in this brief, *infra*, to present the material parts of said evidence and proceedings. This accounts for the length of this Petition and Brief.

Filed herewith is an Appendix of two volumes; comprising in Volume I, the Brief, Answer and Reply Brief, and

Petition for Rehearing of Appellants, petitioners herein, and in Volume II the Answer Brief of the Appellees, respondents herein, in the Circuit Court of Appeals. Said volumes are herein cited by pages of each document in acquainting the Court with the material contentions and admissions of the parties, and with the fact that there is no issue of material fact presented in the competent evidence in this action as between petitioners and respondents.

While some fifteen reasons or Points are presented in the petition in compliance with the rule that on review only such Points as are alleged in the Petition may be considered on review, only the principle reasons for the exercise of the Court's legal discretion in issuing the Writ of Certiorari herein to review the opinion and judgment of the Circuit Court of Appeals, will be presented at length.

POINT ONE

An agreement between litigants, such as the one here presented, among respondents, relating to the proceedings and issues in the action in court, *which by its terms permits its use, and, which in fact was so employed herein* (pp. 3 to 9 and 35 -36, *supra*) *in influencing the rendition of a judgment in favor of respondents, is inconsistent with the full, impartial and unobstructed course of justice, and is improper, illegal and against public policy, although such agreement would not necessarily be adjudged illegal and against public policy where same is not employed, as the record shows it was employed in the case at bar, to secure the active support of the administrative and judicial officers*

of the Government in controlling the judgment in behalf of respondents.

17 C. J. S., Contracts, Sec. 223, p. 594.

6 R. C. L., Contracts, Secs. 157, 158, p. 751.

Gray v. *McReynolds*, 21 N. W. (Iowa) 777.

Brown v. *First Natl. Bank*, 37 N. E. (Ind.) 158.

Ridenbaugh v. *Young*, 46 S. W. (Mo.) 959.

Gugloz v. *Gehrkens*, 130 Pac. (Cal.) 8.

Dodson v. *McCarnin*, 160 N. W. (Iowa) 927.

Eggleston v. *Pantages*, 175 Pac. (Wash.) 34.

Atwater v. *Sellers*, 239 N. W. (Neb.) 629.

Lazenby v. *Lazenby*, 65 S. E. (Ga.) 120.

While the styling and referring to said contract and agreement as a "Family Settlement" was clearly a misnomer and pure camouflage, *we are not so much concerned with that phase as we are with the obvious record facts set forth on pages 5 to 9, supra, which reveal that the said judgment, if not entered into for such wrongful purpose, was certainly employed by the Assistant United States Attorney, representing the Government and restricted parties, to bring the influence of the officers of the Departments of Interior and Justice and the trial judge to the support of the respondents against these petitioners in consummating the plan to secure a judgment herein establishing the heirship of the respondents to the estate of the said Jackson Barnett, deceased, and which plan so supported was successful.*

On pages 67 to 79, Appellant's Brief, V. I, Appendix

hereto, the relevant record facts are presented at greater length. *The opinion of the Circuit Court of Appeals contains no reference to the participation of the trial judge in the execution, approval and carrying out of said agreement among respondents, the use of same in influencing the judgment herein, or the effect of such participation and use.* The only phase of this series of actions noted in the opinion of the Circuit Court of Appeals is discussed as follows:

> "* * * *Attorneys of widely recognized ability and professional integrity, representing different groups in the contract (respondents) testified that they participated in the negotiations leading up to the preparation and execution of the agreement; that the enormous labor and expense required to make the investigation and produce the evidence necessary to overcome the proof offered by certain claimants, notably Bertha Barnett, Henry Barnett and Mayetta Kingston, were the major factors which induced the parties to enter into the agreement, and that the suppression or withholding of any evidence was never suggested, discussed, contemplated or practiced. They testified without qualification or condition that no pertinent evidence coming to their attention or knowledge had been concealed, or withheld, or excluded from the record. And the contract expressly provided, among other things, that the persons constituting each group should continue to prosecute their claims; and the approval of the Acting Secretary of the Interior, which was essential to the contract becoming binding upon the parties, was subject to the condition that all available evidence should be fully and fairly presented to the court.* * * *" (122 Fed. (2d) p. 786.)

There was no issue or evidence as to the standing, reputation or integrity of any of the attorneys for respondents,

who felt the necessity of testifying; many attorneys for the respondents and all of the numerous employees of the respondents, who assembled the evidence, did not testify; the record shows that no one really took the claim of Bertha Barnett et al. seriously, in that the fact that the claim was fabricated and the evidence inconsistent was evident, and the statement to the contrary is surprising (pp. 13-15, Appellants' Answer and Reply Brief, V. I, Appendix hereto; pp. 82 et seq., Appellees' Brief, V. II, Appendix hereto); however, if true, why pollute the stream of justice rather than fight the legal battle fairly? Of course, the agreement provided that the various members of the groups should continue to present their claims, however, the admitted purpose of the agreement was to prevent the introduction of evidence inimical to any of the groups, and obviously the condition that all available evidence should be fully and fairly presented was less than an idle gesture, and, if taken seriously, would serve to destroy the purpose of the agreement. Indeed, the fact that an Appellate Court was required to take cognizance of such a situation is regrettable.

POINT TWO

Having interpled on behalf of the United States in this proceeding to determine the heirs of said restricted estate, and so acting for the protection of the possession thereof by the United States, as well as in the interest of such restricted Indian claimants, including petitioners, as might be adjudged to be heirs to the said estate, *it follows that the Assistant United States Attorney was without legal or moral*

right to participate in negotiating, executing, presenting, and securing the consideration and approval of the so-called agreement or family settlement, among and on behalf of the respondents, by the officers and representatives of the Departments of the Interior and Justice, and the trial judge, with the purpose of aiding in obtaining a judicial adjudication that the respondents were heirs to the said estate as against these petitioners, and other restricted parties. That the said United States Attorney in said situation was without right or authority to so aid the respondents and to prepare and present to the said trial judge for approval, findings of fact and conclusions of law in favor of said respondents and against these petitioners, and said trial judge is presumed to have known that fact.

That in personally participating in any manner in the said negotiation and approval of the said agreement and in permitting the said United States Attorney to so appear and represent the respondents as against these petitioners and to present said requested findings of fact and conclusions of law and in approving same, the said trial judge gravely erred, and was thereafter disqualified to act in consummation of the agreement.

It is not believed that the Court will need authority in support of the soundness of the above elementary rule that both said United States Attorney and the trial court should have maintained a strict course of impartiality and fairness as to all interveners. The general rule prescribing and governing the neutral conduct of an interpleader, such as

the United States is in the case at bar, is stated as follows in 33 C. J., "Interpleader," Section 20, page 438:

> "Sec. 20 (b): Favoring or Colluding With Particular Claimant. A party seeking the remedy of interpleader must act in good faith. He must occupy an impartial position as to the issue he seeks to have litigated. A plaintiff in a bill of interpleader must not have lent himself in any way to further the claim of either party to the fund in controversy, or to aid one in obtaining the possession thereof to the exclusion of the other. The holder of a fund or property is not entitled to interpleader where he has himself instigated the claim of one of the parties * * * "

Paragraph 47, p. 459, same, as follows:

> "* * * Where a petition in the nature of an interpleader shows plaintiff a mere stakeholder, with no interest in the subject-matter, a reply which assumes an offensively hostile attitude toward one of the interpleaded defendants, alleging that the latter is estopped from making claim to any right to the stake, is improper, and must at least be disregarded, if not treated as ground for dismissal of the proceeding. 15 R. C. L. 226, as follows:
>
> "'It is of the essence of an interpleader suit that the plaintiff should be entirely indifferent between the conflicting claims, asserting no interest in himself in the fund in dispute. An attitude of perfect disinterestedness, excluding even an indirect interest, on the part of the plaintiff is indispensable to the maintenance of the bill, and his position must be one of "continuous impartiality", save that the thing in his possession be awarded to the right party * * *'."

In numerous cases cited to said above-quoted text, the rule is stated as follows:

> "To invoke the principle of interpleader, the party seeking relief must have incurred no independent liability to either claimant, and must stand perfectly indifferent between them in the position of an innocent stakeholder."

We have found no authority to the contrary.

On pages 79 to 82, Appellants' Brief, V. I, Appendix hereto, the unchallenged facts are fully presented. The Circuit Court of Appeals overlooked this point.

POINT THREE

That the said trial judge was personally biased and prejudiced against petitioners and in favor of respondents is clearly evidenced by the repeated, unprovoked, unquestioned hostile, oppressive, threatening acts and charges on the part of the said trial judge against petitioners, petitioners' counsel and witnesses during said purported hearing, and that the participation of the said trial judge prior to said purported trial in the approval and carrying out of the said agreement among respondents against these petitioners, without doubt, served as the source and basis of said prejudice, and as a result thereof petitioners were precluded from fairly presenting their case, and the mind of the trial judge incapacitated to fairly weigh and consider same, and the proceeding was wholly divested of the principal characteristics of a judicial hearing and fails to reflect that calm and deliberate consideration of the evidence and judicial impartiality which are consonant with the administration of justice and due process of law. (Pp. 82 et seq.,

Appellants' Brief, V. I, Appendix hereto; pp. 512-547, V. I, Clk's Tr.; and pp. 3-9, 19-23, 35-38, supra.)

POINT FOUR

That the detailed allegations of specific facts, in the form of the stenographic record, as appears from the above, and hereafter, are fully set forth in, and, as Exhibits, to said petition and affidavit to disqualify, and same are not statements of conclusions, but of facts. That said petition and affidavit to disqualify specifically state, in addition to the above specific acts and the detailed facts of said collaboration by the said Assistant United States Attorney, and the trial judge, in and about the execution, approval and carrying out of said agreement in favor of the respondents and against these petitioners, which occurred prior to the beginning of the purported trial, and knowledge of which did not come to petitioners or their counsel until two days before the filing of the said petition and affidavit to disqualify and which were sufficient to and did establish that the mind of the trial judge was personally biased and prejudiced against these petitioners, and that on that account the said purported hearing was not a judicial trial, and that the Circuit Court of Appeals erred in overlooking the above and in according the said proceedings and purported judgment the consideration, weight and effect which are properly accorded to the proceedings of a court conducted by a qualified judge. (Pp. 19-20, 36-37, supra; 481-482, 512-546, V. I, 748, 750, V. II, Clk's Tr.; and 68-75, Appellants' Brief, V. I, Appendix hereto.)

That in addition to the instances set forth on pages 3 to 8 and 18 to 23, *supra*, the verbatim record of a sufficient number of said unprovoked, repeated, hostile, and oppressive acts, statements, threats and charges on the part of the trial judge, all of which were fully set forth in said petition and affidavit to disqualify (V. I, pp. 512-546, Cl. Tr.; pp. 1338-1340, V. II, Cl. Tr.; pp. 10-23, same; pp. 82-97, Appellants' Brf. and pp. 4-55, Pet. for Rehear., V. I, Appendix hereto) are here presented to clearly establish the existence of such bitter feeling, animosity, and personal bias and prejudice on the part of the said trial judge against these petitioners, and in favor of respondents, as to preclude, as same did in fact preclude, petitioners being accorded a fair and orderly hearing; and to divest the proceeding in which petitioners sought to present their case herein of all the characteristics and semblance of a judicial hearing and proceeding; and to conclusively evidence such disturbed mental condition as to render said trial judge incapable of fairly considering and weighing the evidence on the part of petitioners.

WADE KILCREASE, full-blooded Creek Indian, more than 76 years of age, being a material witness on behalf of these petitioners, had testified in substance that he was personally acquainted with Billy McCombs, a preacher, who lived close to Tuskagee Church in the Creek Nation, about 7 miles from Eufaula, and that while a boy Jackson Barnett lived with said McCombs about the time the Katy Railroad was built (1872); that he thereafter lived about in that community; that said Jackson Barnett belonged to the Tuckabatchee

Creek Town and the Bear Clan; that he knew Sinda Colbert, who lived near Tuskagee, and that later the said Jackson Barnett was her husband; that witness went to school near there (pp. 4744-4746, V. 10, R. Tr.); that said Jackson Barnett and Sinda had one child, a boy; that they went to church together and slept together (pp. 4751, Vol. 10, Rep. Tr.). *This witness was in no manner impeached, and his evidence was not in any particular contradicted by either oral or documentary evidence, however while so testifying, as is fully set forth in said petition and affidavit to disqualify the trial judge, the following proceedings, among others, were had:*

"The Court: Now he was only ten years old.

Mr. McPherren: Your Honor, I am presenting the evidence of the witness.

The Court: I am just telling you.

Mr. McPherren: I think Your Honor will see this man knows what he is talking about.

The Court: He didn't know so much about that case I tried down there."

(Reference is to a case tried at Durant, Oklahoma, in which Wade Kilcrease had stated to the interpreter that he was a witness and Judge Williams was the judge and that the judge still owed his witness fees.)

"Mr. Gibson: *General McPherren didn't tell him about that*" (pp. 4749-5150, Rep. Tr.).

(Obviously, this is a direct insinuation that McPherren had told the witness about other parts of the witness' testimony. This improper and unfair statement was not rebuked by the trial judge. As appears from the

record of the proceeding during the portion of the two days these appellants, petitioners, were attempting to introduce evidence, which record is embodied in said petition and affidavit to disqualify the trial judge, counsel for the said three groups, respondents herein, and for other claimants, abetted, encouraged, assisted by the trial judge, repeatedly attacked said counsel and the witnesses on behalf of these petitioners.)

"The Court: What church did he ever see them sleeping together? (Interpreter Alexander was interpreting.)

Interpreter Wiley: That is not asking the question.

The Court: At what church did he ever see them (Jackson Barnett and Sinda) sleeping together. That is what I asked him" (p. 4751, same).

(The court was using two interpreters, Wiley and Alexander, furnished by the Indian Agency in the examination of these old Creek Indian witnesses of petitioners, and said interpreters added somewhat to the great confusion by repeatedly challenging the correctness of their respective interpretations.)

A. "At Tuskegee.

The Court: Whereabouts were they sleeping together at the church?

A. Just a little south of Tuskegee in a little dwelling.

The Court: Who else was in there sleeping?

Interpreter Wiley: That is not the question either. He is asking him who else saw him.

The Court: Who else was there sleeping in the house?

A. Don't know the name. Don't remember the name.

The Court: Whose house was that where they were sleeping?

A. I have forgot it, too.

The Court: But he hasn't forgotten that he saw them there sleeping together. Ask him why he remembers that so well and don't remember the other.

A. All in one room. Anybody has a right to look around everybody sleeping in one room.

Q. Did you ever see Jackson Barnett at Chowee Colbert's?

Mr. Gibson: We object to that as leading and suggestive."

(Whether the objections were or were not well founded, and although the witnesses were full-blooded Indians, who understood no English, and were being examined through the use of interpreters, who were not well qualified, counsel for the said group, respondents herein, soon after these petitioners commenced the introduction of evidence, began the course of interposing repeated objections that the questions propounded to interpreters by counsel for the petitioners were leading and suggestive. It should be noted that such objections, although without merit were invariably the basis of attacks either on the witness or counsel for these petitioners, or both, of such nature as to conclusively evidence hostility on the part of the trial judge.)

"The Court: **If you get it out on a leading question I wouldn't believe it. I am not so sure I will believe him anyhow.**

Mr. McPherren: That is a matter for the court to determine and it is not before us at this time.

The Court: Tried before me—

Q. Where did Sinda live, if you know?

A. Little south of Tuskegee Church.

Q. Did Sinda ever live with Joe Colbert?

Mr. Gibson: Objected to as leading and suggestive.

The Court: I sustain the objection.

Mr. McPherren: Exception. Will Your Honor permit him to answer the question, or do you want me to state?

The Court: No, I won't let you state and won't let him answer.

Q. Do you remember as to whether or not you saw Jackson Barnett at Chowe Colbert's?

Mr. Gibson: We object: leading.

The Court: **Needn't answer that. I have ruled on that. It is in the record. I think this is a witness that the court should not permit to be led. You may put that in the record."** (P. 4756, same; pp. 23-28, appellants' brief and pp. 6-10, pet. for rehearing, V. I, appendix hereto.)

(In the situation presented the questions propounded to the interpreters and to which said objections were interposed and sustained in the usual harsh, hostile, and insinuating manner were not leading and suggestive, and it is perfectly apparent from the record that no useful purpose could be served by attempting to further examine the witness.)

ROBERT KELLEY, a full-blooded Creek Indian, 87 years of age, an important witness on behalf of these petitioners, testified in substance through the interpreters, that he personally knew Billy (William) McCombs and Joe (Chowe) Colbert at the time the Katy Railroad was built (in 1872); that the family of Joe Colbert later consisted of Thompson Colbert, his nephew, Sinda Colbert, and Jackson Bar-

nett, then a young man who was a member of the Tuckabatchee Creek Town, and was married to said Sinda, the niece of Joe Colbert; that he did not know the age of Jackson Barnett while he lived at Joe Colbert's, but he was old enough to be married; that Jackson Barnett told witness that he was married to Sinda; that Joe Colbert, the uncle of Sinda, also told witness that Jackson Barnett was married to Sinda; that witness saw them going to church together; that witness at that time lived about 4 miles from Joe Colbert; that Jackson Barnett and Sinda were at Joe Colbert's when the child (Albert Brady) was born (pp. 4764-4767, V. 10, Rep. Tr.); that he went to Texas some time later and stayed ten years with his uncle and then returned to Eufaula, Creek Nation, and that about three years later he visited Leecher's Ferry, and that Jackson Barnett was staying there; that he had known Leecher for a long time; that later he saw Albert Brady at the home of Siah Barnett, and that he asked Siah Barnett who Albert Brady was, and that Siah Barnett told him that Albert Brady was the son of Jackson Barnett (p. 4775, Rep. Tr., V. 10). (This is the Siah Barnett who it is admitted by respondents was the father of Jackson Barnett.)

This witness was in no manner impeached, and his evidence was not in any particular contradicted by either oral or documentary evidence, however while so testifying, as is fully set forth in said petition and affidavit to disqualify the trial judge, the following proceedings were had:

"The Court: Ask him how he knows (Jackson Barnett and Sinda) they were married.

A. He was there and saw them and the young lady said—

The Court: Who said?

A. Said the young folks said they were married.

The Court: Ask him if he ever heard Sinda or Jackson say they were married.

A. He heard when he was there—(Interpreter did not finish interpreting answer).

The Court: I want to know if he ever heard Sinda or Jackson say they were married—

The Court: **He will answer my question first. Now ask him to say whether he ever heard Jackson or Sinda say they were married. He can answer that if he isn't a contrary witness. Now he seeks to evade by saying somebody else. That shows he is a contrary witness. He understands English. He has testified before me in this court in other cases."**

(The trial judge confused this witness with Wade Kilcrease who had theretofore testified.)

"He knows whether he ever heard either one of them say that. You can hear me. You have testified before me.

The Interpreter: **He is telling what he saw and not what he heard.**

The Court: **You tell him to answer what he heard. If he don't I will put him in jail. That is whether he ever heard Jackson or Sinda say whether they were married to one another, and for him to answer the question. I won't let him testify further in this case, and I will commit him to jail.** (Pp. 4766-4767, same.)

A. Jackson told him himself that he had married Sinda and he saw them going to church together—

The Court: **Ask him why he said he would tell what he saw and not what he heard. I heard him say that. So he**

falsifies himself right here in court. (P. 4767, V. 10, same.)

A. Said he couldn't tell without seeing. Had to see before he knew what he was about to tell.

The Court: He ain't worried any—

The Court: He explained to the interpreter he was going to tell what he saw.

Mr. McPherren: He understood that is what you wanted.

The Court: He probably understood what you wanted.

Mr. McPherren: Your Honor please, I don't like those insinuations. I am an honest practicing lawyer.

The Court: Yes, but you are not the only man connected with these cases."

(What, if anything, this purported justification means is unknown to us. It is clear from the record that nothing had occurred in any of the instances to serve as provocation for the insinuations, charges, and attacks by the trial judge. A pertinent question is as to what was the moving cause or motive of such repeated attacks, and the evident mental bias of said judge.)

"By Mr. McPherren: —**But you see what I want. I don't want anything out of him but to answer my questions—**

The Court: **I understand. With these kind of cases there sits an interpreter and there sits a scoundrel to bring this evidence in here. I see that. I have had them all these years and I weigh this evidence with all skepticism."**

(Referring to Sim L. Liles, who was employed to assist in assembling and presenting evidence on behalf of petitioners, two inexperienced restricted Indian women, and who was not a witness and in no other man-

ner participated in the trial of the case and against whom no evidence of misconduct was presented.)

Mr. McPherren: **Why do you persist in charging**—(P. 4768, V. 10, Rep. Tr.).

The Court: **You keep on persisting on these questions. Go ahead."**

(Note: What questions?)

Mr. McPherren: I want to ask him this question: State who you heard other than Jackson Barnett say that he and Sinda were married, if any one, that lived there at Joe Colbert's?"

(Mr. Alexander succeeded Mr. Wiley as interpreter.)

A. "Yes.

Q. Who?

A. All the neighbors around there (p. 4769, V. 10, Rep. Tr.).

The Court: Was that one called Charlie also called Jackson sometimes?

A. I knew Jackson Barnett as Jackson Barnett and not Charlie Barnett (p. 4770, V. 10, Rep. Tr.).

The Court: **That is not answering the question. The question was asked and he is going to answer my question. Understand? He is smarter than he claims to be. He has testified before me before. I want to know if that man he called Charlie Barnett was also sometime called Jack or Jackson Barnett. Now he can answer that yes or no or state he don't know.**

Interpreter Wiley: There is one word he (Alexander) is putting in. He was called either Jack or Jackson and the interpreter says one word Jackson.

A. Charlie Barnett is different man.

Q. Was he (Charlie Barnett) ever known as Jack or Jackson Barnett, or do you know that?

A. No—"

(Although the fact had not yet developed in the proceeding, Fisher's Exhibit No. "20" being the first record prepared by the Dawes Commission relating to Albert (Barnett) Brady (Sewell) erroneously recites that Albert Sewell (Brady) was the son of Sinda by her first husband, *Charlie Barnett,* and said record was later corrected by the Dawes Commission in Brady Ex. No. "5", being the census card of Albert and Dora Brady, and made to correctly recite that *Jackson Barnett* was the father of Albert Brady; however the erroneous statement as to the death of said father was not corrected (pp. 125-126, appellants' brf., V. I, appendix hereto). Clearly the trial judge had in some manner learned and had in mind this erroneous statement as to the parentage of Albert Brady, the father of these petitioners in making the last above inquiries and same was made in the interest of respondents.)

Q. "—How long did Jackson Barnett live there about Chowe Colbert's?

A. I wouldn't know how many years, but he was there when the child was born. He told me himself.

The Court: He has that child on his brain. That shows it. When I ask him anything he is obtuse he can't get that out of his head. That is the way to weigh evidence. I know. He has been in this court before. When he tells he wasn't paid he was probably subpoenaed as a witness.

Mr. McPherren: That was a different man. (Wade Kilcrease.)

The Court: Maybe the man didn't pay his witness fees.

Mr. McPherren: He (Wade Kilcrease) thought he was being funny. (P. 4771, V. 10, Rep. Tr.)

The Court: Oh no, he ain't that smart—

Q. —Where was Jackson Barnett when he told you about this child?

The Court: Didn't he say he met him at Leecher's Ferry?

Ask him how long he had been back from Texas before he met him at Leecher's Ferry.

A. About three years after my return from Texas.

The Court: Whose return?

A. (By interpreter): His return.

The Court: **He testified Jackson Barnett went to Texas and stayed ten years.**

Mr. McPherren: **No, Your Honor.**

The Court: **Well that would be thirteen years. That would be 1885 or 1886 when he saw him at Leecher's Ferry.**

Mr. McPherren: **He didn't testify Jackson Barnett left the Indian Territory.**

Mr. Crump: **We agree**—" (P. 4773, V. 10, Rep. Tr.)

(It is obvious from the repeated interruptions, the above being only one of many instances, on the part of the trial judge, of the examination of witnesses on behalf of these petitioners, by propounding questions unrelated to the examination, and the misunderstanding of the prior evidence of the witnesses testifying, that the trial judge bestowed little, if any, attention to the evidence being presented on behalf of petitioners.)

"The Court: Ask him when he came back from Texas where he went to.

A. Eufaula.

The Court: Then how come him to stay at Eufaula three years and then go up to Leecher's Ferry?

A. Said he went anywhere on a horse—

The Court: **This court has discretion about these matters and we are not going to have these obstinate witnesses and monopolize the time of the court.**

Q. How did he happen to be at Leecher's Ferry? Did he know John Leecher?

A. Just visiting—

The Court: How long had he known Leecher?

A. Long time—

Q. When you came back did you get acquainted with a man by the name of Albert, Albert Brady?

A. After I came back from Texas I stopped at Siah Barnett's house and asked if that was his son. He said no that was a son of Jackson Barnett.

Q. Who were they talking about?

A. Albert Brady.

The Court: **Was Albert Brady grown then?**

A. **He was a grown man.** (Pp. 4775, V. 10, Rep. Tr.)

The Court: **He has testified he (Albert Brady) was born about the time he (Robert Kelly) left and he was gone ten years and he says now he was grown. The only way to catch up with his kind is to trap him.**

Mr. McPherren: **And not ask how long it was after he came back. (From Texas.)**

The Court: **Ask him whether it was before or after he made that citizen's right trip up to Leecher's Ferry.**

A. **After I came back from Leecher's Ferry.**

The Court: **How long after?**

A. **He figures about four years.**

The Court: **Then he (Albert Brady) would only be seventeen years old.**

Mr. McPherren: **That is about grown—**

The Court: **—I am not going to stand for all that. We are not going to take all the time of this court to fool with him. He understands the English language.**

Mr. Crump: **I think so, Your Honor, I wouldn't believe him either.**

Mr. McPherren: **I think that it is unfair to try to turn this court into a kangaroo court. You should sentence a man to jail for making that statement.**

The Court: **He has a right to say that. Anybody else want to ask any questions?**

Mr. Gibson: **I don't think so."**

Clearly, Mr. Gibson, representing the respondents nor any other reasonable person, would be of the belief that anyone should desire to "ask any questions." The trial judge and Mr. Crump had completely disposed of the witness, Robert Kelley, as being unworthy of belief, *and Mr. Crump had so stated, and the trial judge had closed the matter by stating that Mr. Crump had the right to so state.* Although the trial judge ordered the witness, Robert Kelley, out of the court room, *the judge had not finished with the witness, and as Robert Kelley was leaving the witness stand, further attacked the witness as follows:*

"The Court: **Ask him why he went to Texas and stayed ten years.**

A. **That was to visit my uncle, my father's brother named Tobe Kelley,** * * * etc. (P. 4777, V. 10, Rep. Tr.)

Q. (By Mr. McPherren): **You didn't run away from any crime, did you?**

Mr. Anglin (Representing respondents): **I just wanted to know. I have heard he never would tell."**

(It will be noted that the trial judge and not Mr. Anglin asked this question.)

Q. "(By Mr. McPherren): Had you violated any law when you went to Texas?

A. I am not a thief. Therefore, I don't live that way. I am full-blood Creek right today and nobody better than I am." (P. 4778, V. 10, Rep. Tr.) (The material evidence of the above witness is presented on pp. 28-35, appellants' brief and pp. 10-19, pet. for rehearing, V. I, appendix hereto.)

(This witness, as the record of his testimony reveals, was a proud, dignified old Creek Indian and resented the unseemly attacks upon him and declared to the interpreter "I am done" and the court ordered him out.)

It is not believed that the history of the administration of justice in this Country presents a more ruthless example of persistent effort on the part of a trial judge and counsel to intimidate a witness, and obviously the mind of the trial judge was in no condition to accord evidence on behalf of the petitioners any consideration or weight whatsoever.

THOMPSON COLBERT (pp. 4715-4741, V. 10, Rep. Tr.), a

full-blooded Creek Indian, age about 96 years, and a material witness on behalf of these petitioners, testified through said interpreters, in substance, that he knew Billy McCombs and Joe (Chowe) Colbert and Jackson Barnett; that Joe Colbert was his uncle; that Jackson Barnett when about fifteen years old was living at Billy McCombs'; that later Jackson Barnett lived at Colbert's; that Sinda Colbert, a niece of Chowe (Joe) Colbert, and several other young Indians lived at Joe Colbert's, who was an Indian judge; that Jackson Barnett and Sinda lived together and were the parents of Albert; that Jackson Barnett was a member of the Tuckabatchee Creek Town and Sinda was a member of the Hickory Ground Creek Town; that when Albert was about a year old Jackson Barnett left Sinda and went over on Cane Creek on the Arkansas River (Leecher's Ferry), and later Sinda went to live with her brother, Dick Colbert. Said witness was further interrogated and the following proceedings were had:

Q. "(By Mr. McPherren): **What kin was Sinda, Jim and Dick Colbert to Chowe Colbert?**

Mr. Anglin: **Your Honor, there are very few of his questions so far but what are leading.**

The Court: **Yes.**

Mr. McPherren: **I will change it then, Your Honor."** (P. 4718, V. 10, Rep. Tr.)

(The questions were not leading, but as appears McPherren unsuccessfully sought to avoid the ire of the judge.)

"The Court: **I never pay much attention to these kind of cases where they ask leading questions—**

Q. —Do you know who the father of Albert was?

A. Jackson Barnett was his father.

Q. How do you know Jackson Barnett was the father of Albert?

A. He was living there and made the child.

Q. How was he living there?

The Court: Ask him who told him.

A. **Those folks at home.**

The Court: **That don't amount to anything.**

Q. **What folks?**

The Court: **You may prove possession by hearsay, but you can't prove procreation by hearsay. Ask him what folks told him that."**

(Of course, this ruling is erroneous and no doubt had the mind of the trial court been in its normal and unprejudiced condition, such ruling would not have occurred. While the witness was permitted to answer the question, it is evident that the trial judge gave the evidence no consideration.)

Q. **"—Name the persons there at Chowe Colbert's home who said that Jackson was the father.**

The Court: **Who said Jackson made him. That is what he said.**

A. **Medilla Colbert.**

Q. **Who was she?**

The Court: **So she told Jackson made that kid, is that what you meant?**

A. **Yes.**

The Court: **Do you contend old Jackson and that woman were married (Jackson Barnett was about 21 years old at that time)?**

Mr. McPherren: **Yes, sir, they lived together. The record shows Jackson Barnett is the father. (Of Albert Brady.)**

Mr. Gibson: **And also dead.**

Mr. McPherren: **We will show you that was an error. Said he was a member of Hickory Ground Town, and he wasn't. (All the witnesses testified he was a member of Tuckabatchee Creek Town.)**

The Court: You will have to prove common law marriage."

(This ruling that petitioner, Dora Brady, was required to show that her grandfather, Jackson Barnett, and grandmother, Sinda Colbert, were married according to the common law is erroneous, and the later finding of the trial court that there was no evidence of such marriage of Jackson Barnett and Sinda Colbert, is likewise erroneous, for the reason that "Brady's Exhibit No. 5", being the census card or enrollment record of Albert Brady and Dora Brady, recites that Jackson Barnett and Sinda Colbert were the parents of Albert Brady, *and it is well settled that it follows from said statement that the presumption is that the stated parents were married and that Albert Brady was a legitimate child.* See authorities cited and discussed on pp. 170-174, original brief of appellants herein, V. I, Appendix hereto. Clearly in approving the said finding and conclusion of the trial court, the Circuit Court of Appeals erred.)

Q. "(By Mr. McPherren): How old did you say Jackson

Barnett was when you first knew him up at William McCombs'?

A. About fifteen years old.

Interpreter Wiley: I don't think he (the other interpreter, Alexander) got the question right, there.

Mr. McPherren: Your Honor, are we going to have this trouble?

The Court: Yes (p. 4735, V. 10, Rep. Tr.).

Q. Jackson Barnett. Does he state that Jackson Barnett was a young man when he first knew him at Billy McCombs'?

A. Yes, sir.

Q. And now how long did he live at Billy McCombs' before he came over to Chowe Colbert's to live?

A. About two years.

Q. Then he was two years older than being a grown man when he went to Chowe Colbert's?

A. Yes.

Q. Then was it a mistake when they understood you to say he was only five years old when he went to Colbert's?

A. Yes, that is my mistake (statement by interpreter).

Q. Who was the older?

Mr. Anglin: You say that was 'my' mistake?

The Interpreter: Yes." (P. 4736, V. 10, Rep. Tr.)

It is evident that these interpreters were incompetent and could not secure answers to questions other than the most direct and that even with direct questions the result was doubtful. In such situation the following occurred:

"Mr. Richardson: **Your Honor, please, Mr. McPherren said he was going to discontinue leading questions.**

The Court: **I figure he has the witness fixed.**

Mr. McPherren: **No, Your Honor.**

The Court: **That is the way I do. I don't pay any attention."** (P. 4722, V. 10, Rep. Tr.)

Clearly, this and other statements of the same import, is an affront no man worthy to practice at the bar should be required to suffer at the hands of a trial judge. *It was not even suggested that any reason or provocation existed for the repeated hostile and oppressive acts, statements, threats and charges on the part of the trial judge against petitioners and their counsel and witnesses, other than the unfounded claim that leading questions were asked, except the personal prejudice engendered in the mind of the trial judge as the result of the negotiation, execution and approval of said agreement or family settlement as is alleged in said petition and affidavit to disqualify said judge.* The above quoted record, and other records, which will be hereinafter presented, reveals that this cause of conduct toward said attorney and witnesses for the petitioners was pursued by the trial judge herein until the effort to present evidence in said proceeding on behalf of these petitioners was finally abandoned. **Certainly, the Circuit Court of Appeals must have overlooked the record acts and statements of the trial judge, fully presented in said petition and affidavit to disqualify, and in the briefs filed in said Court (V. I, Appendix hereto), as it is believed no unbiased mind could conclude that said trial judge was not thoroughly and personally**

prejudiced against these petitioners and in favor of the respondents and utterly disqualified to hear and determine any issue herein between petitioners and respondents.

Bearing in mind the fact that the three above witnesses, Wade Kilcrease, Robert Kelley, and Thompson Colbert, were full-blooded Creek Indians, ranging in ages from seventy-six to eighty-seven years; wholly disinterested in this proceeding and unchallenged and uncontradicted in any particular, *except said attacks on the part of the trial judge and counsel for respondents;* and bearing in mind the further fact that a normal mind does not engender such hostile actions without a moving cause, motive, or objective, and there being none other suggested in the proceeding, *it was and is earnestly believed that the belief that said judge was so disqualified, on the part of the petitioners, and their counsel, based on said hostile acts, and the then recently acquired knowledge that the trial judge had participated in the said negotiation, execution, and carrying out of said agreement or family settlement* (pp. 3-9; 19-21, *supra*) *is both reasonable and sound.*

DORA BRADY, one of the appellants and petitioners, among other things, had testified that Albert Brady was her father; that she was born September 17, 1899, in the Creek Nation; that her father told her that Jackson Barnett, a Tuckabatchee Creek Town Indian, who lived around Henryetta, Oklahoma, was her grandfather; that she and her father went to visit her said grandfather when she was about eleven years of age (1910); that she did not talk to her grandfather, but that Albert Brady, her father, talked

to him; that she saw her grandfather, Jackson Barnett, after that two or three times (pp. 4979-4983, V. 10, Rep. Tr.); witness went to Sacred Heart (Catholic School) from 1914 until 1918, and communicated with her father, Albert Brady, every week. *During that time and in 1917 she received a newspaper clipping from her father through the mail (Brady Exhibit I, p. 4782 same); the newspaper clipping sent by her father in 1917 had a picture of her grandfather in the left-hand corner and underneath it was "Jackson Barnett", Brady's Exhibit No. I, p. 4984, same).* (See reproduction between pages 122-123, original brief of these appellants, appendix hereto; that witness was living at Claremore when her grandfather, Jackson Barnett, was kidnapped by the white woman, and read about the occurrence in the newspaper and discussed same with her father, Albert Brady, and Nora Pearson (Vol. 10, pp. 4878-4986); witness was at Los Animas, Colorado, when she learned her grandfather, Jackson Barnett, was dead (p. 4986, same); got that information on June 29, 1934, and wrote a letter to Muskogee on June 30, 1934, and received a reply identified as Brady's Exhibit No. 9 (p. 4987, same).

Dora Brady (pp. 8651-8656, V. 18, Rep. Tr.) *was thereafter called as a witness by counsel for respondents, in the purported trial of the issue said counsel had raised, on direction of the trial judge, as to the truth of the record facts alleged in said petition and affidavit to disqualify said judge, and was interrogated by said judge and counsel for respondents* as to her place of residence since she filed her interpleader herein; when she first met Sim L. Liles; how she

first heard of the death of her grandfather, Jackson Barnett (p. 8651, same); how she financed the trip from Nevada to Oklahoma to file her intervention herein; how she financed the preparation and presentation of said intervention; and in this connection the trial judge asked and was answered as follows:

Q. "Who financed you after you came to Oklahoma?

A. Well, I financed myself. When I came here I had right around $100.00. And after I got in the case and needed money, Mr. Davis helped me along.

Q. How much has he given you?

A. I don't think very much because I have been working over here for my room and board—" (p. 8652, same).

Dora Brady was further interrogated as to why she returned and the terms of the contracts she has executed with her attorneys and others for service in preparing and presenting her intervention (pp. 8652, same); where she has lived since returning to Oklahoma to intervene herein; and both the trial judge and counsel for respondents attack her moral character as follows:

A. "Well, he (Sim L. Liles) sent me a picture. My little baby picture and told me if I was that woman he would like to communicate with me, if I wasn't to send it back to him.

Q. Then you wrote him?

A. No, I came to Oklahoma.

The Court: Who was the sheriff (p. 8652)?

A. Jim Smith.

The Court: Did you have any talk with Jim Smith before you received that letter?

A. I knew Jim Smith since 1928.

The Court: Whereabouts?

A. Fallon, Nevada.

The Court: Did you sign a contract?

A. Yes, sir.

The Court: **Have you got a copy? (Later the judge required a copy to be introduced in evidence.)**

A. **Yes, sir, I have, but I don't think I have it with me—**

Q. **—You are living at Sim's (Liles) house?**

A. **I am staying out there, yes.**

Q. **How long have you been there?**

A. **I think it was the last of July or in August, 1938.**

Q. **Had his wife already left him?**

A. **Yes, but I was out there long time before she left their house.**

Q. **Sim and his wife had a row about you?**

A. **No, sir. His wife went to California on account of his daughter being sick—**

Q. **—You just live there with Sim alone?**

A. **No, there is nobody there.**

Q. **And that has been going on six or eight months?**

A. **Little over a year.**

Q. **Do you plan to remain there with him?**

A. **Not any longer than I have to.**

Q. **Not planning on getting married?**

A. **I should say not" (p. 8653, same).**

(What was the purpose of this examination? The reason will appear later.)

Further the said trial judge and said counsel for respondents interrogated said Dora Brady as to *why she made affidavit to disqualify the trial judge* (p. 8653, same); *what attorney she saw when she returned to Oklahoma* (p. 8656, same).

SIM L. LILES, who was employed by Judge E. C. McMichael on behalf of petitioner, Lucinda Watashe, to aid in locating her half-sister, Dora Brady, and afterwards employed to aid in investigating the facts, locating and assembling witnesses and evidence on behalf of petitioners, who as inexperienced Indian women were incompetent to perform said service in their own behalf, and said Liles not being a witness on behalf of petitioners, was called and required to testify on behalf of respondents in an effort of respondents' counsel to establish their issue and contention that the facts alleged in said petition and affidavit to disqualify the trial judge were untrue. As such witness on behalf of respondents the said Liles was questioned principally by the trial judge, assisted by counsel for respondents (pp. 8630-8647, V. 18, Rep. Tr.) as to what caused him to come to Court on that day; what connection he had with the claim of petitioner; who employed him, and was required by the trial judge to produce his contract of employment; who advanced expenses, and who was Judge Burt; who was E. A. Davis, who advanced same expenses and as to the amount he was to get out of it; if he contacted

McMichael and McPherren about his contract and where; as to whether he had an office and as to his business; who was his lawyer; as to whether a man in Tulsa, Oklahoma, contributed to the expenses; who else other than the lawyers will receive an interest in the estate (pp. 8630, 8634, same); where is Dora Brady living and how long has she lived with witness; does she pay board; are you a married man, and as to whether his wife is at home; whereabouts of his children; as to whether when Dora Brady came in, his wife got out; as to how witness located Dora Brady for Judge McMichael; where and how long before she returned; who filed the intervention petition for Dora Brady and Lucinda Watashe; how long was it after Lucinda filed before he heard from Dora Brady; how it happened he wrote a post card to the sheriff inquiring about Dora Brady; how the sheriff replied to the inquiry; how it happened witness thought to write to Nevada; did witness sent a card to Colorado, too; did he pay Dora a salary; as to witness promoting these claims; as to who employed the lawyers, as to whether petitioners employed lawyers before they contacted witness; as to witness having charge in the main of locating and assembling the evidence; as to time spent by witness in so doing; as to who was the interpreter (pp. 8634-8642, same); that Dora Brady did not know about this litigation until you located her or until you wrote the sheriff to contact her; that you, yourself, caused Dora Brady to return to Oklahoma and intervene in this case; inquired as to whether Lucinda Watashe, supposedly the half-sister of Dora Brady, had al-

ready employed a lawyer at the time of said inquiry, and who was that lawyer (pp. 8643-8644, same).

J. C. Stone, representing the respondents, closed with the following interrogatories:

Q. "(By Mr. Stone): Just tell the court why you have Dora Brady at your house now.

A. Well, that is a short story. She hasn't any home here; no place to stay; no money. She don't have a brother or sister, father or mother, and she has no money—

Q. —You made an affidavit, did you not, to disqualify the trial judge in this case?

A. Me?

Q. Yes, sir.

A. I never heard of it.

The Court: I don't think he signed it * * *"

Since Liles was not a witness for petitioners and did not sign or have any part in filing the said petition and affidavit to disqualify the trial judge, why did counsel for respondents call him as a witness and why did the trial judge and counsel violate the rules of evidence and outrage decency by such examination? The basic reason for the above vigorous and unwarranted attacks on Liles on the part of the trial judge and counsel for respondents was their evident belief that Liles was responsible for the return of Dora Brady, and for the petitioners filing the interventions herein, and for the presentation of the evidence of the numerous disinterested and unbiased witnesses which clearly establish the fact that petitioners are the granddaughters and the

heirs to the estate of the said Jackson Barnett, deceased. This fact is conclusively shown by the examination of Dora Brady, Mary Davis, and Sim L. Liles by the said judge and counsel presented above and specifically by the following:

Asked of Dora Brady:

Q. "**(By Mr. Stone) If it hadn't been for Sim Liles looking you up you never would have been a party?**

A. **Yes, I would if I could have got an attorney to take it for me." (P. 8654, V. 18, Rep. Tr.)**

Asked of Mary Davis:

Q. "**(By Mr. Gibson) Do you know Sim Liles?**

A. **Yes, sir.**

Q. **Don't you know Sim Liles has been working in this case since the time your daughter intervened about two years ago?**

Mr. McPherren: **That is objected to as incompetent, irrelevant and immaterial.**

The Court: **I will let him bring it out.**

A. **No, sir, I did not.**

Q. **You knew he was working on it when you saw him first?**

A. **Yes, sir.**

Q. **Do you know who employed him?**

A. **I do not." (P. 4802, V. 10, Rep. Tr.)**

Inquiring of Liles to the same effect, and that he performed the principal part of the work in and about locating

witnesses and presenting evidence on the part of petitioners. (Pp. 8639-8640, V. 18, Rep. Tr.)

The only conclusion that can be reasonably deduced from the above examinations by the trial judge and counsel for respondents, relating wholly to immaterial matters and revealing animosity, is that same were based solely upon unreasoning resentment because of the said course of action on the part of petitioners and Liles, and were apparently bottomed on the belief that such course was violative of the rights of respondents.

MARY DAVIS, formerly Brady, the second wife of Albert Brady, who were the mother and father of the petitioner, Dora Brady, was a material witness on behalf of petitioners and testified in substance that she married Albert Brady in February, 1898, and that petitioner, Dora Brady, was born to them in September, 1899; that Jackson Barnett, deceased, whose heirs are being determined herein, and a member of the Tuckabatchee Creek Town, was the father of Albert Brady, and that Sinda Sewell, formerly Colbert, was his mother; that Jackson Barnett was Sinda's first husband and Parney Sewell was her second husband; that Albert Brady had lived with Andrew Brady, who was the stepfather of said Parney Sewell, who married Sinda, Albert Brady's mother; that it was because Albert lived with Andrew Brady that he took the name Brady instead of Barnett; that Albert Brady and Jackson Barnett, his father, visited each other after her marriage to Albert Brady, and until 1912 when she was divorced from Albert Brady. (V. 10, pp. 4787 to 4797, Rep. Tr.)

At this juncture in the examination of Mary Davis, the Court took over the examination as follows:

"The Court: **I want to find what interest you have?**

A. **Dora is my daughter.**

The Court: **She is an intervenor?**

Mr. McPherren: **Yes.**

The Court: **I just wanted to find that out, see whether she had any motive to fabricate. I will dig into it.**

Q. When was the next time you saw Albert Brady (Jackson Barnett)?

A. Jackson Barnett?

Q. Yes.

The Court: **I have found out a long time a fifth of the evidence is perjury.**

A. **1899.**

The Court: **That is the reason I dig into it. (P. 4793, V. 10, Rep. Tr.)**

(No effort was made to impeach this witness, and the evidence of this witness is in no manner contradicted. Why this insult from the bench?)

Mr. Gibson (representing respondents): **Who were the first lawyers you and she had in this case?**

A. **I never did have no lawyers.**

(The insinuation that Dora Brady or Lucinda ever had a lawyer in this proceedinng except Judge E. C. McMichael and Grant Foreman is unfounded, and the purpose of the insinuation was clearly to further arouse the devastating ire of the trial judge against these petitioners and, as appears, it succeeded.)

"Mr. McPherren: **What is the purpose? (The trial judge did not permit an answer.)**

The Court: **I will let it all come in. I have seen these cases. I don't blame the lawyers for being hired. I had one case where I thought one man was financing two interveners, and I decided against both of them on that. (P. 4803, Vol. 10, Rep. Tr.)**

Mr. Gibson: **We have one man financing three branches.**

Mr. McPherren: **Your Honor, that is not proper here.**

Mr. Gibson: **Not against you. (Then what was the purpose? However the record is to the contrary.)**

The Court: **It is impossible to prejudice me. I watch everything just like a hawk.**

Mr. Gibson: **Do you know who the first lawyers were that filed this suit?**

A. **I do not."**

(The above stated attorneys at all times represented petitioners. See V. I, pp. 308, 427 to 430, Clk's Tr., where original intervention of the petitioners, Lucinda and Dora Brady appear.)

Counsel for respondents, the appellees, were not satisfied with the result of the above attack on the petitioners, petitioners' counsel, the witness, and recalled the witness, Mary Davis, the mother of petitioner, Dora Brady, and perpetrated the following:

Q. "**(By Mr. Gibson) You were on the witness stand yesterday?**

A. **Yes.**

Q. **And have been called as a witness again this morning? Have you talked to General McPherren since you came in court this morning?**

A. I have not.

Q. Have not spoken to him at all?

A. No, sir.

Mr. McPherren: Your Honor, I want to register a protest against the general assumption (of misconduct) here.

The Court: Yes, unless you have some evidence of it. Now you have officers out there that ought to be on the alert and you could have found that out before asking this question."

(What "officers out there" did counsel have, and what "evidence" were they supposed to secure and pass on to counsel for respondents? How did the trial judge know all about said referred to "setup"? What did all this have to do with the attorney of petitioners talking to one of the witnesses of petitioners? The answer is that officers representing the F. B. I. were cooperating with counsel for respondents, and the acid test was being applied to all opposing parties and their witnesses. (Pp. 31-32, Appellants' Answer and Reply Brf., Vol. I, and pp. 83-84, Appellees' Answer Brf., Vol. II, Appendix hereto.) That the trial judge was in close touch and cooperation in the performance of the task of the said F. B. I. representative is clearly evidenced by the action of the said trial judge in, on his own initiative and motion suggesting the introduction in evidence a list of the persons indicated through the efforts of the said representative, as the record shows, to-wit:

"The Court: * * * If you want to you can include their names, style of the case and numbers and verdict of the jury. And where they haven't been tried that indictments have been returned, the number and style, and that they haven't been disposed of.

Mr. Pinson: **I can't see the materiality.**

The Court: **Except you are sort of striking at me about that when I was talking about having a grand jury. That has been done. * * *" (Pp. 8830, Vol. 18, Rep. Tr.) (Counsel for respondents presented the list and same is an exhibit.)**

(The fact that neither the petitioners nor any of their witnesses were among the parties indicted does not militate against the evident fact that had any excuse been available such indictments would have been secured.)

Thereupon the following occurred:

"Mr. McPherren: **I have sat here—(and submitted to insinuations and indignities too long). I want to protest against this trial proceeding under such conditions as render it impossible for me to represent the interests of my clients.**

The Court: **No, it ain't. You are mistaken about that. I told these witnesses that they had a right to talk to you. (P. 4870, V. 10, Rep. Tr.)**

Mr. McPherren: But they assume and the court seems to agree—

The Court: You have representatives here? (Who had what representatives?)

Mr. Gibson: If Your Honor please, I saw her come in with General McPherren, and that is the reason I asked for her.

Mr. McPherren: The officer reported that she was there (in the witness room) and I called her. (Gibson had asked for the witness.)

The Court: The attorneys must be courteous.

Mr. Anglin (representing respondents): Mr. Gibson meant

nothing against Mr. McPherren, and if so I do not join in it.

Mr. Gibson: Of course I don't.

Mr. McPherren: Knowing the atmosphere and attitude here I refrained from speaking to her.

The Court: **This don't help you. I don't believe anybody can prejudice me against any case. I believe I can try any case without any prejudice. Now ask her about the other things. (What other things?)**

The Witness: **May I speak?**

Mr. Gibson (representing respondents) **Yes. (Mr. Gibson had assumed command.)**

The Witness: **He (referring to General McPherren) said, 'We want you in the court room.'**

The Court: **That is not talking. (If it were talking what rule exists against counsel talking to the witness on the part of his client?)**

Mr. Gibson: **That is all that was mentioned?**

Mr. McPherren: **It was my duty to report (her presence).**

The Court: **That wouldn't be included in talking.**

The Witness: **I haven't talked to him (McPherren) since I was on the stand. I went to Coalgate and stayed over night and haven't spoken to him until just a moment ago."**

(Note: It is hardly believed that such an unwarranted attack on an attorney for a litigant ever before went unrebuked in a United States Court. The trial court was content to again reiterate his often-stated belief that "I don't believe anybody can prejudice me against any case." (P. 4871, same.)

(This old mother, observing the attack on McPherren, which was based on the immaterial and ridiculous charge that McPherren had talked to her since she had testified the day before, as McPherren had the right to do in that she was one of the witnesses of petitioner, Dora Brady, deemed it her duty to speak out and deny the truth of the attack. A most unusual and embarrassing situation and highly indicative of the fact that these petitioners were having no "day in court.")

HUGH HALE, a witness on behalf of these petitioners, testified in substance *that he lived near the Albert Brady allotment from 1901 to 1911, and that before and after that time he knew Jackson Barnett.* That Albert Brady often left Dora, his daughter, at the home of witness when he was required to be absent from home during the day, and on one of said occasions Jackson Barnett returned with him, and Albert Brady stated that Jackson Barnett was his father (pp. 4890-4896, V. 10, Rep. Tr. *It will be noted that this was ten years after counsel for respondents contend Jackson Barnett, the father of Albert Brady, died.* The trial judge took over the examination of the witness as follows:

"* * * The Court: When Albert introduced you to Jackson.

A. I just spoke to him. * * *

The Court: What did he say?

A. He said that was his son.

The Court: No, in response to your salutation saying 'how do you do,' what did he say?

A. I don't remember just exactly how he spoke the words.

The Court: What words did he use?

A. **He said 'that is my father.'**

The Court: **You have the son on the brain, apparently. I want to get the whole thing—when he answered your salutation where you bowed your head and said 'how do you do,' what did he say before he got to the son part of it?**

A. **I don't remember. * * *"**

(Who could remember exact words and order in which same were spoken 25 years in the past?)

"* * * The Court: **No, you don't remember that and I don't believe you either. If you were telling the truth you could tell the balance. That ain't on the brain and ain't vital * * *" (Pp. 4892-4893, Rep. Tr., V. 10.)**

(Why this attack?)

LUCILLE HIATT, as a witness on behalf of these petitioners, testified that her father, together with his family including witness, moved on the allotment of the petitioner, Dora Brady, *as a tenant in the fall of 1904 and that Albert Brady, the father of these petitioners, lived on his allotment which adjoined said allotment of Dora Brady. (It will be noted that this was 4 years after counsel for respondents contend that the Jackson Barnett, who was the father of Albert Brady, was dead.) That Jackson Barnett and Albert Brady came to her home on Dora Brady's allotment and ate some meals, and that Albert Brady told her and her family that Jackson Barnett was his father.* That witness saw a picture of the same man, Jackson Barnett, in the newspaper about the time it is said he was kidnapped (1920) (pp. 4814 to 4819, V. 10, Rep. Tr.) Said witness was further inter-

rogated and the following occurred:

Q. "* * * Was that the last time you saw him?

A. *No, he came back one more time with Albert and had supper with us.*

Q. Would you be able to recognize his picture? (P. 4817, same.)

A. I don't know. I might.

Q. Did you see any picture of this man that was there in the newspapers?

A. Yes, I believe I did.

Q. When?

A. The time he was kidnapped, I believe. However, I don't read the papers much.

Q. You saw his picture then?

A. Yes, sir.

Q. Was it the same man?

A. Yes, sir.

The Court: **Now you will have to submit many kinds of pictures. (No picture had yet been submitted to the witness.)**

Mr. McPherren: **I will submit all we can get hold of.**

The Court: **I won't pay any attention. That will convince me it is a frame-up they are just trying to change that Hickory Ground."**

(Why this insinuation of a frame-up?)

(The trial judge refers to the erroneous recital of Brady's Exhibit No. 5 that Jackson Barnett was a member of Hickory Ground Town. *That no Jackson Barnett ap-*

peared on the Hickory Ground Town roll, and that no Jackson or Jack that could have been the father of Albert Brady appeared on the Hickory Ground Town roll was shown both by the evidence of J. D. Fulton, the custodian of the said rolls (pp. 4923-4926, V. 10, Rep. Tr.) and by the certificate of the Commissioner to the Five Civilized Tribes, being Brady's Exhibit No. 8, p. 715, V. II, Clk's Tr.; pp. 48-50, 125-128 Original Brief of Appellants herein; Vol. I, Appendix hereto; but the trial judge declared he would pay no attention to the evidence.)

"Mr. McPherren: * * * She doesn't know anything about Hickory Ground.

The Court: The records show that Jackson Barnett of Hickory Ground was the father of Albert Brady. (One record so erroneously stated. Jackson Barnett lived in Hickory Ground area, but was a member of Tuckabatchee Town.)

Mr. McPherren: This witness doesn't know.

The Court: This will be for the purpose of showing a mistake in that by innuendo. Just take these frame-up pictures and show them to her. (Offering pictures introduced by other claimants.)

Mr. McPherren: This is a picture introduced by somebody else.

The Court: The way to do is take twenty-five pictures and say, pick out the one. (P. 4818, V. 10, Rep. Tr.)

(Of course pictures of Jackson Barnett for such a test were not available, but all that were available, were used.)

Q. * * * I hand you Brady's Exhibit No. 4, and I will ask you to state whether or not that looks like Jackson

Barnett did at that time, if not, what is the difference? (First picture submitted by petitioners to witness.)

A. At the time he was at our home?

Q. Yes.

A. The time he was at our house he had long hair, and he had a crease in his face.

Q. How about the face?

A. Apparently the face looks natural.

Q. Did you notice any peculiarity about his face?

A. Nothing but the deep creases, and he smiled a lot.

Q. Did you try to talk to him?

A. We talked to Albert and Albert talked to him.

Q. Did he talk much or little?

A. He talked quite a bit to Albert.

Q. Did he talk to you white people?

A. Not much—" (P. 4819, same.).

The disturbing effect of the hostile feeling and strong personal bias and prejudice on the part of the trial judge against these petitioners upon the actions and faculties of the trial judge with reference to evidence and proceedings on behalf of these petitioners is further well illustrated by the following: *R. C. Mason had testified that in 1917 he was interested in ascertaining the identity of the heirs of one Yargee, and that he was informed that Jackson Barnett, whom he had known since about 1914, and who lived in the vicinity of Henryetta, Oklahoma, was related to said Yargee and probably could furnish pertinent information (pp. 8676-8677, V. 18, Rep. Tr.); that he saw Jackson Barnett at the*

home of Timmie Randall, not far from Henryetta, and that through the use of an interpreter talked to Jackson Barnett about his and Yargee's family relations. The following questions and answers, among others, were asked and given and proceedings had:

Q. "* * * What conversation did you have with him at Timmie Randall's with reference to his relatives?

A. I went out there to ask him about his relatives according to instructions I had from Billie McCombs, and took (p. 8679, same) an interpreter Kosar Brown; asked if he was related to Stephen Barnett the father of Susan Yargee. He said he might have been distantly related, very distant, blood relation.

(This is the Billy McCombs Jackson Barnett once lived with.)

Q. Did you have any further conversation with him with reference to his relatives at that time?

A. Yes, we asked if he had any children. He said he had a boy papoose long time ago; said he lived over west around Bristow. I asked him what his name was. He said his name was Albert.

Q. Did he say whether or not he (Albert) owned a farm?

A. Yes, he said he did have his allotment. He had a good farm.

The Court: Now that has been the criticism during this entire trial. Now you put in the mouth of this witness evidence that shows that Jackson Barnett is an incompetent, and which has been so found by this court in his findings; and which has been so found and adjudicated by Judge McCormick for the Southern District of California in the case involving the validity of that marriage; and so found by District Judge Knox of the Southern District of New York in the litigation as to the trust

fund, which was held by him to be void on the grounds of incompetency. Now when that is the background before this court I strike out that answer (p. 8680, same).

Mr. McPherren: Your Honor, what answer is it you strike? (The last question and answer above was read by the reporter.)

Mr. McPherren: Now, is that the answer you are striking or further above?

The Court: Read the one above that.

(The next to the last question and answer above was read by the reporter.)

Mr. McPherren: Now, Your Honor, it is no leading question.

The Court: I didn't strike that out.

(The last question and answer was again read.)

The Court: I strike that out that is leading.

Mr. McPherren: Exceptions.

The Court: Any question that can be answered yes or no is laid down by Greenleaf specifically as a leading question." (V. 18, pp. 8679-8681.)

It will be noted first, that none of the three questions can be reasonably classed as leading and suggestive; second, that opposing counsel had not objected to said questions on any ground; third, that the judge's challenge to and striking of the question were as the judge states, on the ground that Jackson Barnett had been repeatedly held to be an incompetent, and that he could not know and state that he had a son, and that the son owned a good farm; fourth,

that the trial judge's closing statement that the last question was leading was not only an afterthought, but was erroneous.

ALICE FOX, formerly Alice Brady, a full blooded Creek Indian, the first wife of Albert Brady, and the mother of the petitioner, Lucinda Watashe, formerly Brady, testified through the interpreter as a witness for said petitioner, Lucinda Watashe, in substance, that she was past sixty years of age and that Albert Brady was her first husband; that they were not regularly married, but were married by common law (Indian custom); that Albert Brady, before they were married, had lived at the house of her mother. (Pp. 4995-5000, V. 10, pp. 5001-5008, V. 11, Rep. Tr.) Thereupon the following occurred:

"Mr. McPherren: * * * We offer as Brady's Ex. No. 10, Creek Census Card No. 503, field No. 505, with reference to this witness * * *

Q. How old is your daughter, Lucinda?

A. Forty-two years old, I think.

Q. Now you stated that Albert Brady lived at your home before you and he were married or lived together. What, if anything, was said about your living together?

(No answer permitted.)

The Court: Ask her how old she was.

Mr. McPherren: (to interpreter): Just let her answer.

The Court: We are not going to have any leading. Ask her how old she was when she had a talk with Albert Brady. Ask her how old she was.

The Interpreter: With reference to their marriage?

The Court: How old she was before they had a talk about living together.

A. About twenty-five years old.

The Court: She was about twenty-five?

A. Yes, I don't know exactly." (P. 4997, V. 10, Rep. Tr.)

(The trial judge then proceeded to incorrectly and confusedly construe said census card and erroneously announced the conclusion that Alice Fox, the witness, and the first wife of Albert Brady, *did not live with Albert Brady before the petitioner, Lucinda Watashe, was born in 1896, because he was married to Mary Brady, afterwards Davis, who was the mother of Dora Brady, in 1898.* The fact is the said census card showed Alice and Lucinda were enrolled June 20, 1899, and that Alice Fox, the mother of petitioner, Lucinda Watashe, was born in 1879, and that petitioner, Lucinda Watashe, was born in 1896, and that Alice Fox was the mother and Albert Brady the father of said Lucinda Watashe, and there was no occasion for said confusion. Thereupon the trial judge continued the examination.)

The Court: **She (Mary Davis) testified that she married him in the Sac and Fox County in 1894. Ain't that what the record shows?**

Mr. Cate (of counsel for respondents): **1898 I think** (p. 4998-4999, same).

Mr. McPherren: **This is (Alice Fox) the first woman he (Albert Brady) lived with.**

The Court: **No, sir, in the face of this statement.**

Mr. McPherren: **We will excuse the witness and except to the ruling of the court.**

The Court: **All right. Here is the reason the court holds this: Go back and read the statement of this woman.**

Mr. McPherren: **Albert Brady was sent to the penitentiary before the birth of Lucinda and he never came back to her. (Alice Fox.)**

The Court: **That may be your case, but I am talking about what this woman says. She testified before she had any agreement with Brady to live with him that she was twenty-five years old. Ain't that right. Now here you have introduced this card to prove when she was born. Now this shows she was twenty-five years old on March 13, 1902, and if she was twenty-five years old that would be 1907 when that occurred and after this white woman was married to Brady and the presumption is that marriage continued. She couldn't have an agreement to live with him and be his common law wife when he was already married. If you want it to go in it is all right with me."**

(All of the above statements were erroneous, and it was evident that the mind of the trial judge was sealed against evidence favorable to petitioners.)

"Mr. McPherren: I except to the ruling of the court and withdraw the witness.

The Court: **Hold on. Don't be so fast * * ***

The Court: **Yes, according to that I don't see how the same lawyer could represent both of them.**

(This was the trial judge's third attack on the right of counsel to represent petitioners.)

(For some reason, not apparent from the record other than the facts stated in said petition and affidavit to disqualify said trial judge, the trial judge persisted in assailing the good faith and integrity of counsel for the

petitioners, and asserting that said representation was improper, and as will hereinafter appear, endeavored to force the withdrawal of the said counsel as such attorney from this proceeding.)

Mr. McPherren: * * * They (the two petitioners) admit that they are sisters.

The Court: Who?

Mr. McPherren: Dora and Lucinda, these two admit that they are half-sisters.

The Court: This woman (the witness Alice Fox) would be an heir.

Mr. McPherren: She was divorced and married again.

(Evidently the trial judge had given no attention to the evidence as to the relationship and status of these petitioners and was shooting in the dark. Counsel for the groups, respondents herein, no doubt appreciated the fact that the proceedings had entirely passed from the sphere of a judicial proceeding and sought to restore the proceeding to a semblance of a judicial trial through the medium of the following statements for the information and guidance of the trial judge.)

Mr. Richardson: * * * They (the half-sisters) join together in their application each contending that they are (granddaughters) daughters.

The Court: If this is inheritance, descent—all right. You are trying your own law suit. Introduce it. (Who was trying the law suit? What was the issue other than inheritance—descent? Introduce what?)

Mr. McPherren: Your Honor said you wouldn't pay any attention. What is the use of proceeding further?

The Court: No, I didn't say I wouldn't pay attention.

Mr. McPherren: Will the court permit me to examine?

Mr. Gibson: (representing respondents): **We have no objection.**

(Note: Mr. Gibson and his associates now undertake to come to the aid of counsel so as to permit the examination to continue.)

Mr. Richardson: **Mr. Cate (representing respondents) says this date in the lower right-hand corner is the date of the application of all three of the parties on this card, and that this date, March 13, 1902, is the date of the approval of the roll by the Secretary of the Interior.**

The Court: **Then you say this other marriage was 1898. (It was in June of 1898.) That would go back to 1879 and she was twenty-five years old. That would put it around 1904. If you all want it in it is all right with me. (If who wanted it in?)**

(Note: Counsel for the coalition having agreed to the examination of this witness on the part of these petitioners, the court acquiesces with the statement "It is all right with me.")

Mr. Phillips: **Whether this Brady was any relation to Jackson Barnett is the real issue. We don't care whether they had 100 daughters or just one. (P. 5000.)**

Mr. Richardson: *** * * If Albert Brady was the son of the Jackson Barnett here in controversy and Dora Brady was his heir of course we wouldn't succeed. * * ***

(Counsel for the respondents were endeavoring to make the situation clear to the trial judge that they did not object to counsel appearing for the two half-sisters, but the trial judge refused to be mollified.)

The Court: **No.**

Mr. Richardson: **And if Dora is going to succeed it is immaterial with us if she shares it with her alleged half-sister.**

Mr. McPherren: **But we do not ask any concessions from them. We are not in this court by their leave, we hope, and we don't like our right to interrogate our witnesses to depend upon whether or not they agree to it.**

The Court: **If there is no objection made I permit you to examine.**

(Why was the right of counsel for petitioners to examine this witness on behalf of petitioners conditioned on consent of respondents?)

Q. Before you began to live with Albert Brady did you and Albert have any conversation or talk with any one? (No answer permitted.)

The Court: Let me get this straight. I am entitled to have all the information I want in a case. Now it developed for the first time Albert Brady went to the penitentiary. When did he go? (P. 5001, V. II, Rep. Tr.)

The Court: * * * She won't know the exact date.

Mr. Gibson: We object to the question because he assumes that they were married.

(What question assumed a marriage?)

Mr. McPherren: July 9, 1896. (Answering the trial judge.)

The Court: How long was he in the penitentiary?

Mr. McPherren: Released December 30, 1897.

Mr. Gibson: We object to the question as assuming they had a conversation.

The Court: No. She will have to state.

Mr. McPherren: That is what I asked.

Q. What was said by anyone if anything, before you and Albert Brady began living together?

Mr. Gibson: There is no proof they did.

Q. State whether or not you lived together.

Mr. McPherren: She said he was her husband.

The Court: The way I understood he lived with her and her mother both. (This statement of the trial judge convinced counsel for petitioners that any attempt to proceed further was worse than useless.)

Mr. McPherren: I decline to examine further. I am not permitted to do so.

The Court: Very well, if you want to withdraw, I will let you. (No one had asked to withdraw. Why did the trial judge so suggest?)

Mr. McPherren: I am not withdrawing. I am just turning her over to them.

The Court: If you want to abandon the case I will let you do so. (No one had expressed an intention to abandon the case.)

Mr. McPherren: No, sir.

The Court: And I will make the record. (What record?)

Mr. McPherren: I will surrender the witness to them. (P. 5002, same.)

Mr. Phillips: No questions.

The Court: Very well, you decline (addressing Mr. McPherren)?

Mr. McPherren: I have interrogated her as far as I am able to.

The Court: Very well, if you withdraw.

Mr. McPherren: I don't withdraw.

The Court: It is just up to you. I am going to make the record."

(What record? No further record of this occurence was made and petitioners undertook to present no further evidence as it was obvious that the mind of the trial judge was firmly closed to evidence on behalf of these claimants.)

It is sincerely believed that no unbiased mind, whether it be that of a lawyer or layman, can read the above record of the attempted examination of the witnesses on behalf of these petitioners and fail to be convinced that the trial judge had, as the result of personal bias and prejudice against these petitioners, lost all sense and conception of the principles of a judicial trial and actively participated in converting the proceedings into one which "failed to reflect that calm and deliberate consideration of the evidence, and that judicial impartiality which are consonant with the principles of justice and due process of law," and in which no consideration was given the evidence presented by these petitioners.

That in preparing the joint opinion of the Circuit Court of Appeals filed in the five separate appeals from the said judgment, the author thereof overlooked and on that account had no conception or appreciation of the broad scope and scathing nature of the unwarranted and unprovoked, hostile and threatening conduct, statements, innuendoes and charges on the part of the trial judge, during the attempted presentation of said evidence, against petitioners, petitioners' counsel and witnesses, and had in mind only the proceedings in the Bennie Barnett Scott, Lucy Kurns *et al.*, and Bertha Barnett *et al.* appeals, clearly appears therefrom as follows:

"One remaining argument merits attention. It is urged with emphasis that the trial, including the making of findings of fact, failed to reflect that calm and deliberate consideration of the evidence and that judicial impartiality which are consonant with the principles of justice and of due process of law. * * * The only phase of the matter worthy of discussion is the conduct of the court. *The record indicates that the attitude of certain attorneys was provocative at times, and the court was justified in the belief that some of the testimony was fabricated.* Still, we are not to be understood as approving all of the statements, comments and criticisms coming from the court, or the excess of interference with the attorneys in their examination of the witnesses. *But there is no showing whatever that the complaining parties failed to introduce all of the evidence which was available to them.* And we think the court reached the right conclusion in the end. *Another long and expensive trial, without the incidents of which complaint is made, would in all probability conclude with like findings of fact and judgment.* * * *" (122 Fed. (2d) 789, bottom second col.)

Since the record discloses no instance of provocative attitude or action on the part of counsel for the petitioners, and since the evidence on the part of petitioners was not challenged, as being fabricated or contradicted in any part, except in the hostile and unsupported verbal attacks of the trial judge, the above statements in said opinion could have no reference to petitioners or their counsel. Further, the said statement in the opinion that "* * * there is no showing whatever that the complaining parties failed to introduce all of the evidence which was available to them," if intended to apply to petitioners, is in the face of the record

of the proceedings. (Pp. 100-102, *supra*, and pp. 4898-5000, V. 10 and pp. 5001-5009, V. 11, Rep. Tr.)

As the record of the proceedings in the trial court shows (pp. 4714-5000, V. 10, and pp. 5001 to 5009, V. II, Rep. Tr.) when the turn of petitioners came to present their case, the same was presented to the extent the trial judge would permit during a part of two sessions, the entire hearing on the part of all parties consuming approximately twenty-four days, **separated by adjournments had on the initiative of the trial judge ranging in length from ten days to several months. The evidence, oral and documentary, in the record is voluminous; however same shows that a large part thereof consists of depositions which were presented in evidence as the record shows, without being read, and documentary evidence presented in like manner, and the excuse that the hearing was a heavy burden and overtaxed the strength of the trial judge** urged in the brief of counsel for respondents in the Circuit Court of Appeals is without foundation; however said situation, if true, should not weigh or militate against the granting of a fair trial before an unbiased and unprejudiced judge.

The occurrence and nature of the above attacks, and others of like character, on the part of the trial judge and counsel for respondents, upon petitioners, petitioners' counsel and witnesses, during the said proceeding, were not and could not be questioned since same, as is hereinbefore demonstrated, are conclusively evidenced by the record; however, counsel for the respondents undertook to explain and excuse same in appellees' brief as follows:

(a) By stating that, referring to Dora Brady *et al*: "This group complains of alleged mistreatment of some of their witnesses, and one of their counsel. The matters of which they complain arose primarily because of the manifest *absurdity of their claim.*" (Italics theirs.) (P. 213, Appellees' Brf., V. II, Appendix hereto.) Is it not pertinent to inquire why the presentation of the evidence of numerous uncontradicted and unimpeached witnesses and documentary evidence on behalf of petitioners conclusively supporting their claim that said Jackson Barnett was the father of Albert Brady and grandfather of petitioners should be considered by the trial judge a "manifest absurdity"? Although the evidence of more than a score of disinterested, unimpeached and uncontradicted witnesses establish the fact that the Jackson Barnett, who was a member of the Tuckabatchee Creek Town, and whose heirs are being herein determined, was the father of Albert Brady and the grandfather of petitioners, assume that the truth of said evidence, both oral and documentary, was questioned, on what theory could said attacks on the part of the trial judge be excused other than personal bias and prejudice?

Further the record shows that the trial judge devoted several combined orders, findings, statements and briefs, ranging from 10 to 264 typewritten pages in length, in adversely disposing of the claim of petitioners herein, and that one of the said documents covers 285 pages of Vol. II of the Clerk's transcript herein. Surely if the said claim was "manifestly absurd" such numerous and long argumentative orders could hardly have been required on the part of

the trial judge. We submit, without more, that this excuse is itself open to the charge of being a "manifest absurdity."

(b) By erroneously stating: "They (counsel for petitioners) tried improperly and unsuccessfully to impeach the tribal and final rolls of the Creek Nation." (Appellees' Brf. as above.) The fact is petitioners relied upon the final rolls of the Creek Nation, Brady's "Exhibit 5" herein, being the enrollment record of Albert and Dora Brady, the petitioner, which states that Jackson Barnett and Sinda Colbert were the parents of Albert Brady and grandparents of Dora Brady, the petitioner, and only questioned an immaterial recital that said Jackson Barnett, a member of the Hickory Ground Creek Town died prior to 1900, and presented documentary evidence, being all the rolls of the Hickory Ground Creek Town and the Town King, conclusively showing that no such Jackson, or Jackson Barnett, at any time was ever a member of said Hickory Ground Creek Town, and the oral evidence of numerous uncontradicted and unimpeached witnesses that said Jackson Barnett was a member of the Tuckabatchee Creek Town, but lived in the area of Hickory Ground Town.

The record herein shows that such erroneous statements of incidental matters occur so frequently that two such instances are presented in the evidence; one erroneous statement being as to the Creek Town to which the father of Ellen Barnett, an intervener herein, belonged, and as to the date of his death, and the other being the identically same erroneous statement as to the Creek Town and the date of the death of said Jackson Barnett, the father of said Albert

Brady and the grandfather of these petitioners. As to the first erroneous statement, the trial judge permitted proof of the fact and found same to be erroneous. (P. 1137(B5), Vol. II, Clk's Tr.; Sunny Exhibits 1, 2, pp. 33-37, Answer and Reply Brief, Vol. I, Appendix hereto, where facts are fully stated.)

As to the identical, immaterial, erroneous statement as to the Creek Town and the date of the death of said Jackson Barnett, the trial judge ruled to the contrary.

Aside from the above facts, conclusively to the contrary, assuming that petitioners were trying to impeach the tribal and final rolls of the Creek Nation—what justification would that furnish the trial judge for said attacks?

(c) *By stating that "Judge Williams was justly irritated and highly indignant because from time to time he was charged directly or by insinuation with judicial unfairness,"* and that said judges' *"just soul revolted at the misconduct of counsel and witnesses, and at the plain wickedness displayed at the trial."* (P. 200, Appellees' Brf., V. II, Appendix hereto.) (Pp. 42-43, Appellants' Answer and Reply Brfs., Vol. I, Appendix hereto.) Counsel for respondents have not and cannot point to any instance of wickedness or discourtesy on the part of counsel for petitioners toward the trial judge or counsel. The effort, during a part of two days, to present petitioners' evidence to the trial court was solely on the part of the writer of this brief, Chas. E. McPherren, who has actively engaged in the practice of law in what is now the State of Oklahoma for more than 45 years, practic-

ing in all the courts of the Territory and State, including tribal and federal courts, and has heretofore at no time committed or been charged with a contemptuous or improper act or statement. It is true that on June 16, 1938, after the said attacks, *and immediately upon the learning of pertinent facts which accounted for said acts, counsel prepared the petition and affidavit to disqualify the said trial judge on the ground of personal bias and prejudice against these petitioners and same was filed within two days after the participation of the trial judge in the execution and approval of said agreement and family setlement became known, and wherein the record facts and acts and doings of the said trial judge and counsel for respondents were fully stated.* Based thereon counsel for petitioners, as was their duty, have continuously presented and urged the disqualification and inability of said trial judge to fairly hear, consider or determine any issue in this cause. Obviously, the said acts and doings prior to the filing of the said petition and affidavit were not motivated thereby, and no reasonable excuse therefor other than the personal bias and prejudice of said trial judge appears.

(d) Likewise, the statement that "lawyers practicing in the case were provokingly uninformed with respect to the history of the matters under consideration and with respect to the laws governing the Creek Tribe of Indians to which Jackson Barnett belonged." (P. 199, Appellees' Brf., same.) This rather uncomplimentary, if not presumptuous charge, is not supported by the record, and counsel did not cite any

instances or evidence of such ignorance; however, ignorance could hardly be urged as a justification for such attacks.

(e) Counsel for respondents lastly complain "that there were frequent, unfounded and bitter attacks upon high placed and honorable representatives of the United States. * * *" (P. 199, Brf. of Appellees' V. II, Appendix hereto.) *In its application to petitioners and their counsel this statement refers to the fact that on June 16, 1938, when counsel for petitioners first learned through documents, just recently filed in this action that, beyond doubt, the said Assistant United States Attorney, representing the United States as interpleader herein on behalf of petitioners and other restricted Indian parties, and the trial judge, officers and representatives of the Departments of the Interior and Justice had, before the trial of this action began, collaborated with the attorneys for respondents in negotiating, executing, approving and carrying out said agreement between respondents, which had the objective of making certain the rendition of a judgment that respondents are the heirs of the estate of the said Jackson Barnett, as against these petitioners and all other parties to this action, and thereupon counsel advised petitioners of said above facts, and that immediately petitioners and said counsel, having in mind the prior repeated, unprovoked, hostile, and oppressive acts, statements, threats, and charges against petitioners, petitioners' counsel and witnesses on the part of the said trial judge and said counsel for respondents, during the attempt of counsel to present evidence on behalf of petitioners, were convinced and believe, as was and is natural and reasonable in said*

situation, that the door of the court had been closed against petitioners prior to the beginning of the purported trial of this action, and that the trial judge was a partisan of the respondents and so personally biased and prejudiced against petitioners and in favor of said respondents as to preclude the possibility of a fair and impartial trial of the issues between petitioners and respondents. So believing the petition and affidavit to disqualify said trial judge on the ground of said improper conduct and personal bias and prejudice was prepared and filed within two days after the first receipt of said information as to the said acts and doings of said officers, the trial judge, and the attorneys of the respondents, and therein all of the said above matters were fully set forth as facts, together with the record and correspondence relating thereto, and not as conclusions of fact. **This course cannot be fairly characterized as "* * * frequent, unfounded and bitter attacks upon high placed and honorable representatives of the United States * * * " The fact is, no lawyer worthy to practice at the bar, and no self-respecting litigant could do less in said situation.**

The above actions on the part of high officers of the United States is not the first similar attempt to aid in an attempt to seize, control and distribute the assets of this large estate of Jackson Barnett as is evidenced by the opinions of national courts including this Court as follows:

Barnett v. *Equitable Trust Co.*, 21 Fed. (2d) 325.
United States v. *Mott*, 37 Fed. (2d) 860.
Mott v. *United States*, 283 U. S. 747, 51 S. Ct. 642, 75 L. ed. 1385.
McGugin v. *United States*, 109 Fed. (2d) (10th Cir.) 94.

POINT FIVE

That it clearly appearing from the record that said trial judge required the respondents to put in issue the truth of the record facts, so set forth in said petition and affidavit to disqualify said trial judge, and that upon the hearing of the said petition and affidavit on its merits, the trial court admitted and considered voluminous evidence, both documentary and oral, in determining as to the truth of said allegations, and as to the existence of said alleged personal bias and prejudice in the mind of the trial judge. (R. 1070-1071, V. I and 1185-1189, V. II, Clk's Tr.; 109-115, Appellants' Brf., V. I, Appendix hereto, and 21-22 and par. 6, pp. 37-38, supra. It follows that the said trial court, in so proceeding, committed error, and that the trial court exceeded its jurisdiction on the hearing in finding and concluding that the matters and things alleged and set forth in said petition and affidavit were without foundation in truth and in fact, and that the said petition and affidavit were not filed in good faith, and on that account overruled same. In such situation the Circuit Court of Appeals erred in according the proceedings, findings, conclusions and judgment of said trial judge the force and effect of those of a qualified judge. (Pp. 119-122, *infra.*)

> "25. U. S. C. A., Sec. 21, Judicial Code. Affidavit of Personal Bias or Prejudice of Judge. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of

this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, *or good cause shall be shown for the failure to file it within such time.* No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith."

While the language of the statute is, "such judge shall proceed no further therein," the courts construe the language of the statute to mean *that the sole jurisdiction and duty of the trial judge involved is to pass upon the legal sufficiency of the application and affidavit, and that in doing so said judge must accept as true the statements of the application and affidavit and may not inquire into the good faith of the affiant.*

The leading case in point is *Morris et al.* v. *United States,* 26 Fed. (2d) (8th Cir.) 444, which went up to the Circuit Court of Appeals from the Northern District of Oklahoma. It appeared that the defendant, Morris, and others, immediately before the case was called for trial, filed application and affidavits to disqualify the trial judge upon the ground of personal prejudice against the respective defendants and in favor of the United States. The affidavits, in substance, recited that the trial judge was biased and prejudiced against them and in favor of the Government on account of the fact that the trial judge had made addresses before civic clubs and churches in support

of law enforcement, and had stated that he intended to bear down with heavy hands on offenders against the criminal law, stating that the higher the law violator's collar and the whiter his shirt, the longer his sentence; expressed willingness to coöperate in the enforcement of the prohibition laws; that one of the defendants had theretofore been tried on a similar charge; that rigid cross-examination had been conducted and the trial judge had stated at the time, in open court, that in his opinion the witnesses had been tampered with in said case; and said judge had ordered witnesses held for perjury; that relatives of the affiants had been tried on similar charges before the said judge, and that the said judge had stated that the Morris tribe seemed to believe that they had a right to sell whiskey.

As the reason for not filing the affidavit to disqualify the trial judge sooner, the defendant, in substance, stated that on the 20th day of July, 1927, he received information, which he believed, that the trial judge had interested himself in obtaining evidence against the defendant, and that said information, together with the other facts stated, convinced the defendant that the trial judge was disqualified, and that on the following day the said defendant filed said affidavit to disqualify the trial judge in which said fact and the facts theretofore known to the defendant were set forth. It will be observed that this Morris case is on all fours with the case at bar.

The trial judge held that "*the matters set out in the application have been within the knowledge of the defendants and their counsel for many weeks prior to this date, the*

date these cases come on for trial; that the applications are not made in good faith, but for the purpose of causing delay in the trial of these cases, and for that reason they will be denied."

On appeal to the Circuit Court of Appeals, the two controlling questions discussed and decided, were the following:

1. As to whether or not the trial judge had the right and jurisdiction to pass upon the good faith of the affiants in filing said applications and affidavits to disqualify said trial judge.

2. As to whether or not said applications and affidavit which were filed on the date and at the time the case was called for trial, were timely under the facts presented.

The Circuit Court of Appeals in the opinion answered the *first question in the negative, and the second in the affirmative.* In answering the first question and in holding that the trial judge had no authority and jurisdiction under the provisions of the said above-quoted statute to inquire into and determine the good faith of the affiants in filing said applications and affidavits to disqualify said trial judge, the Circuit Court of Appeals held and cited supporting authority as follows:

> "Upon examination of this section of the statute and of the decisions construing the same, we are constrained to the opinion that it was not within the province of the trial judge to pass upon the good faith of the defendant, the affidavit being sufficient in form and accompanied by the required certificate of counsel as to good faith. *Berger* v. *United States,* 255 U. S. 22, 41 S. Ct. 230, 65 L. ed. 481; *Henry* v. *Speer* (C. C. A.), 201 Fed. 869;

Saunders v. *Piggly-Wiggly Corp.* (D. C.), 1 Fed. (2d) 582; *Chafin* v. *United States* (C. C. A.), 5 Fed. (2d) 592: certiorari denied 269 U. S. 552, 46 S. Ct. 18, 70 L. ed. 407; *Lewis* v. *United States*, 14 Fed. (2d) 369 (C. C. A., Okla., 1926); *Nations* v. *United States* (C. C. A.), 14 Fed. (2d) 507, certiorari denied 273 U. S. 735, 47 S. Ct. 243, 71 L. ed. 866; *Benedict* v. *Seiberling* (D. C.), 17 Fed. (2d) 831; *Bishop* v. *United States* (C. C. A.), 16 Fed. (2d) 410; *Craven* v. *United States* (C. C. A.), 22 Fed. (2d) 605."

In answering in the affirmative the second question as to whether the affidavit to disqualify was filed in time where same was filed on the second day after the receipt of the said information as to the said action of the trial judge, the Circuit Court of Appeals reasoned and cited supporting authority as follows:

"Aside from the question of good faith, was the application and affidavit timely? From the affidavit it appears that much of the matter and many of the facts recited were within the knowledge of the defendant, A. B. Morris, for a considerable time before the day of trial. The affidavit recites that on several occasions defendant requested his attorneys to prepare and file application to disqualify the trial judge, but that his attorneys disagreed with him (and it is inferable that defendant yielded to his counsel) until the 20th day of July, 1927, when affiant received new information which was imparted to his attorneys. The affidavit further recites that on the 20th day of July, 1927, affiant obtained an affidavit of one Joe Irvin, which supports the statements made by affiant upon information and belief, as to the fact that His Honor, F. E. Kennamer, had interested himself in obtaining evidence against the affiant, and that on the 20th day of July,

1927, affiant was informed, and verily believes it to be true, that while Department of Justice agents were making investigations in Tulsa, Oklahoma, the said F. E. Kennamer reported to such agents that one of the deputies United States marshall had used Snake Morris, one of the worst bootleggers in the country, as a guard while transferring prisoners. The affidavit further recites that said information could not have been obtained at an earlier date, as it was not known to any of the parties defendant that the same existed until this affiant was so informed as above stated.

"Assuming that until the 20th day of July, 1927, defendant in the face of the persuasion of his counsel, was hesitant or in doubt, we think we can not say as a matter of law that the additional alleged information was not calculated to confirm a doubtful belief upon the subject and if it was sufficient and did have that effect, defendant could not well have acted more promptly in preparing his application and affidavit and filing the same than the following morning. In these circumstances we are of opinion that the application should not have been held untimely. In the light of the authorities cited, we think the trial court erred in assuming to pass upon the good faith of defendant, and in the circumstances the application was timely.

* * * * * * * * *

"Where the party entitled to object is not informed of the disqualifying facts until after the expiration of the time in which objection should be made, his objection, made on discovery of the facts will be regarded as seasonably made."

The above is the text of a part of Section 180, 33 C. J., page 1014, and is supported by the citation of a number of cases, and we have found none holding to the contrary.

In the case at bar it appears that during the two last days of the hearing before the recess was taken a number of the matters and things charged as grounds for the disqualification of the trial judge occurred; it further appears from the specific statements in said affidavit for disqualification that the existence of said contract and the documents and letters referred to, quoted and attached to the petition of Lucy Kurns *et al.*, to disqualify the said trial judge herein, which are referred to and made a part of the said disqualifying affidavit of affiant herein, and which contract, documents and letters revealed the doings, negotiations and acts of the representatives of the respondents, and the knowledge and participation of the trial judge therein did not become known to counsel for the affiant, Dora Brady, intervener in the said cause, until June 16, 1938, two days before said disqualifying petition and affidavit were filed herein on June 18, 1938, and did not become known to the said affiant, Dora Brady, until the actual day of the filing of the same. That it was the fact of the said doings, negotiations and acts and the knowledge and participation therein of the trial judge, together with the stated prior acts and doings of the said trial judge, that thoroughly convinced the affiants, and counsel for the affiants, that the said trial judge was personally biased in favor of the members of the said Siah Barnett, Conner, Stepney-Gough respondents, and against the claims of the petitioners, Dora Brady and Lucinda Watashe.

Since it appears that the said application and affidavit for disqualification of the trial judge was filed within two

days after the said information first became known to counsel for petitioners, and on the very day that it became known to the petitioners, it certainly should be held that the said application and affidavit were filed in due time, and that the trial judge was not warranted in overruling or striking same on that ground.

> "Under Judicial Code, Sec. 21 (Comp. St., Sec. 988), where proper affidavit of trial judge's disqualification because of prejudice was filed, truth of allegations thereof could not be disputed, and it was judge's duty to proceed no further."

The above is the holding in *Lewis* v. *United States*, 14 Fed. (2d) (8th Cir.) 369, being a case arising in the Eastern District of Oklahoma and in which Judge Kennamer refused to disqualify. In discussing and citing authority in support of the holding, the Court used the following language:

> "Did the trial judge err in failing to disqualify himself, upon the filing of the affidavit of prejudice?
>
> "The affidavit for disqualification was carefully drawn, and is similar to that in *Berger* v. *United States*, 255 U. S. 22, 35, 41 S. Ct. 230, 65 L. ed. 481. It was there held, quoting from the headnotes:
>
> " '1. Upon the filing of an affidavit of a party to a case in the district court, in conformity with Judicial Code, Sec. 21 (Comp. Stat., Sec. 988), averring the affiant's belief that the judge before whom the case is to be tried has a personal bias or prejudice against him, and stating facts and reasons, substantial in character, and which, if true, fairly establish a mental attitude of the judge against the affiant which may prevent impartiality of judgment, it becomes the duty of the judge to retire from the case.

" '2. The judge may pass upon the sufficiency of the affidavit, but not upon the truth or falsity of the facts alleged.'

"To the same effect is *Nation* v. *United States,* 14 Fed. (2d) (8th Cir.) 507, decided by the court on July 17, 1926.* * *"

In the Nation case it is held:

"The statute itself is plain in its terms and imperative in its requirements. There is little room for construction. The Supreme Court said in the Berger case:

" 'There is no ambiguity in the declaration and seemingly nothing upon which construction can be exerted—nothing to qualify or temper its words or effect. It is clear in its permission and direction. It permits an affidavit of personal bias or prejudice to be filed and upon its filing, if it be accompanied by certificate of counsel, directs an immediate cessation of action by the judge whose bias or prejudice is averred, and in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another.' "

The Circuit Court of Appeals overlooked and failed to discuss or decide this controlling point.

The opinion of this Court in *Berger* v. *United States,* cited *supra,* is the leading and most-often cited authority. Therein it is held, in substance, *that no disqualified judge should conduct the proceedings of a national court, and that as to whether or not a judge was disqualified was one of greatest importance.* In so holding this Court stated:

"Our interpretation of section 21 has therefore no deterring consequences, and we cannot relieve from its

imperative conditions upon a dread or prophecy that they may be abusively used. * * * *We must conclude Congress was aware of them and considered that there were countervailing benefits. At any rate we can only deal with the act as it is expressed and enforce it according to its expressions. Nor is it our function to approve or disapprove it; but we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged.*

"* * * **To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and if prejudice exist it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.**

"After overruling the motion of plaintiffs for his displacement Judge Landis permitted to be filed a stenographic report of the incident and language upon which the motion was based. We, however, have not discussed it because under our interpretation of section 21 it is excluded from consideration."

It is evident from the above federal authority that the trial judge and the Circuit Court of Appeals overlooked and failed to follow the recognized rule *that a trial judge upon the timely filing of a sufficient petition and affidavit*

to disqualify said trial judge because of personal bias and prejudice has no jurisdiction to thereupon order or to permit the truth of such facts to be put in issue and to then hear evidence and try and determine whether said alleged facts are true, and as to whether said petition and affidavit were filed in good faith, and to find and conclude that said alleged facts were not true, and that the affidavit and petition were not filed in good faith, and that the proceedings and judgment of said court presided over by said disqualified judge were in excess of its jurisdiction, and that same should have been set aside, and that the Circuit Court of Appeals erred in according said proceedings and judgment the weight and presumption due those of a court conducted by a qualified judge.

POINT SIX

That it is clear from the face of the said petition and affidavit to disqualify said trial judge, as well as the unquestioned record of the proceedings, both of which are digested above, that the Circuit Court of Appeals in finding and concluding and holding in the opinion herein that said petition and affidavit to disqualify, "fell far short of stating facts showing bias and prejudice of the court and therefore failed to comply with the requirements of the statute," and that same stated conclusions and not facts, and that the same was not filed until approximately sixty days "after the bias and prejudice of the trial court became apparent," overlooked all of the above stated unchallenged facts. (Pp.

512-547, V. I, and 1332-1342, V. II, Clk's Tr.; pp. 82-97, Appellants' Brf., V. I, Appendix hereto; and pp. 19-23, *supra*.

In that said petition, affidavit and record speak for themselves, it is unnecessary to discuss same further.

POINT SEVEN

Since it appears from Creek Census Card No. 1701, Field No. 1705 (Brady Ex. 5 and Fishers' Ex. Nos. 19, 23), being the enrollment record of said Albert Brady, prepared by the Commission in enrolling Albert Brady, the father of petitioners, Dora Brady and Lucinda Watashe, that Jackson Barnett was the father of the said Albert Brady, it follows that, under the well-recognized rule, announced in controlling federal decisions, that such recital as to the parentage of the enrollee, which appears on the census card (enrollment record) of said enrollee, prepared by the Commission to the Five Civilized Tribes, is descriptive of said enrollee and *prima facie* proof of such stated parentage, and said recital cannot be overthrown, except by clear, cogent and convincing proof to the contrary, and there being no such proof in the case at bar, the said District Court and Circuit Court of Appeals herein erred in failing to follow and apply herein the said rule, although same was applied as to the enrollment record of Jackson Barnett, showing Siah Barnett to be his father. (P. 782 (3-5) Second Col., 122 Fed. (2d).

POINT EIGHT

The Circuit Court of Appeals further overlooked the fact that in determining the right of Albert Brady to enrollment as a member of the Creek Tribe of Indians, and determining his identity information as to whether or not Jackson Barnett, the father of Albert Brady was living or dead at the time of the listing of Albert Brady, or that the said father was a member of any particular Creek Town, were such as is not required as descriptive matter under the provisions of Section 21, of the Act of Congress, June 28, 1898, and on that account such statements were immaterial, and the further reason that the Creek Town to which Albert Brady belonged was controlled by that of his mother, Sinda, and such incidental statements in the absence of special legislation, are without effect, and are not admissible in evidence.

POINT NINE

Where the census card or enrollment record of Albert Brady (Brady Ex. 5), the father of these petitioners, Dora Brady and Lucinda Watashe, which is in evidence herein, states that Jackson Barnett and Sinda (Cinda, Lucinda) were the father and mother of said Albert Brady, and the census card, or enrollment record of Lucinda Watashe, formerly Brady (Brady Ex. 10, p. 4997, V. 9, Rep. Tr.), finds that the parents of Lucinda Watashe were said Albert Brady and Alice Fox, it follows, under controlling decisions, and the presumption is that the said parents of both

said Albert Brady and Lucinda Watashe were married, and that the said Albert Brady and Lucinda Watashe were legitimate, and that the findings and conclusions of the trial judge herein, in substance, that there was no evidence that said stated parents were married, and that Albert Brady and Lucinda Watashe were illegitimate, are erroneous, and the Circuit Court of Appeals erred in approving said findings and conclusions.

The last above three Points are supported by the following authorities:

Page v. *Atkins*, 86 Okla. 290, 209 Pac. 807.

Carter Oil Co. v. *Scott*, 12 Fed. (2d) 780.

Yaholar v. *Autry*, 156 Okla. 257, 10 Pac. (2d) 676.

Mowdy v. *Leeper*, 122 Okla. 16, 250 Pac. 432.

Malone v. *Alderdice*, 212 Fed. 668.

Palmer v. *Replogle*, 152 Okla. 140, 4 Pac. (2d) 30.

United States v. *Wildcat*, 244 U. S. 111, 61 L. ed. 1024, 37 S. Ct. 561.

Haskell v. *Beartail*, 107 Okla. 103, 227 Pac. 392.

Hegler v. *Faulkner*, 153 U. S. 109, 14 S. Ct. 779, 38 L. ed. 463.

Locust v. *Carruthers*, 23 Okla. 373, 100 Pac. 520.

McFarland v. *Harned*, 115 Okla. 291, 243 Pac. 14.

Cox v. *Colbert*, 135 Okla. 218, 275 Pac. 317.

(Pp. 156-174, Appellants' Brief; pp. 59-61, Petition for Rehearing, V. I, Appendix hereto, wherein the above propositions are fully presented.)

POINT TEN

While it seems clear from the above that the issuance of a Writ of Certiorari to review the said opinion and judgment of the Circuit Court of Appeals is within the legal discretion of this Court under Section 240 of the Judicial Code (Sec. 347, U. S. C. A., tit. 28), the Court also has jurisdiction to issue said writ herein to review the said opinion and judgment under Sec. 262, Jud. Code, 28 U. S. C. A., Sec. 377, because the said trial judge exercised excessive jurisdiction in said proceedings and in rendering said judgment, and the Circuit Court of Appeals erred in not vacating and setting the said judgment aside on that ground.

In *Ex parte Chetwood,* 165 U. S. 443, 17 Sup. Ct. 385, as is stated in paragraph 6 of the headnote, the Court held:

> "While, under the authority given to the federal courts to issue 'all writs which may be agreeable to the usages and principles of law' (Rev. St. 716), certiorari has ordinarily been used merely as an auxiliary process, yet, when the circumstances imperatively demand it, *the writ may be allowed by the Supreme Court, as at common law, to correct excesses of jurisdiction, and in furtherance of justice.*"

In *Shields* v. *United States,* 273 U. S. 583, 47 Sup. Ct. 478, wherein the point was as to the action of the trial judge in communicating with the jury other than in open court, and this Court granted a writ of certiorari on that account to review the judgment of the Circuit Court of Appeals which affirmed the judgment of the District Court, and on consideration of same, reversed said judgment.

In *Quercia* v. *United States,* 289 U. S. 466, 53 Sup. Ct. 698, brought to this Court for review on writ of certiorari, the judgment of the Circuit Court of Appeals affirming the judgment of the trial court, was reversed on the ground that the trial in the district court was not fairly conducted because of the fact that the judge of the said court stated to the jury that, in his opinion, a part of the evidence of the defendant was false. It is true that said statement of the trial judge was made to the jury trying the case; however, where, as in the case at bar, the judge is the trier of the facts, the expression of the opinion during the course of the trial that witnesses were committing perjury, counsel committing subornation of perjury and similar charges, based, not upon evidence produced in the trial, but on matters *aliunde* the trial, are much more objectionable and clearly deprive the proceeding of due process of law, and a judgment rendered in such proceeding should be the subject of review by this Court in the exercise of its sound discretion.

In *In re Church Street Building Corporation,* 299 U. S. 24, 57 Sup. Ct. 88, the Court, speaking through Mr. Chief Justice HUGHES, after referring to Section 262, Judicial Code, 28 U. S. C. A., Section 377, held:

> "* * * That provision contemplates the employment of this writ in instances not covered by section 240 of the Judicial Code (28 U. S. C. A. 347), and affords ample authority for using the writ as an auxiliary process and as a means 'of giving full force and effect to existing appellate authority and of furthering justice in other kindred ways.' * * *"

In *Turner* v. *United States*, 14 Fed. (2d) (8th Cir.) 360, speaking through LEWIS, Circuit Judge, it is held that under the provisions of said Section 262 of the Judicial Code that certiorari either protects jurisdiction already acquired or aids in acquiring jurisdiction which might be defeated without the writ and cites *United States* v. *Beatty*, 232 U. S. 463, 467, 34 Sup. Ct. 392, 58 L. ed. 686. To the same effect is the statement of this Court in *Berger* v. *United States*, 255 U. S. 22, 41 Sup. Ct. 230, that the "* * * solicitude is that the tribunals of the county **shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial justice. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged.** * * *"

In Section 6283, V. 8, page 533 of Hughes Federal Practice, in discussing the nature and value of the "sound judicial discretion," that is indulged by this Court in passing upon petitioners for Writs of Certiorari to review the decisions of other courts, among other things stated:

> "The value of the discretion thus constituted is indicated further by the manner of its composition. It is composed with 'careful thought in the light of supporting and opposing briefs, and resolved in accordance with recognized principles.' *The necessary element of judicial discretion thus recognized is that each case 'has its day in court.'* The 'resolution of the matters according to recognized legal principles' is the important qualification of discretion produced by the words 'sound judicial.' Content of discretion is not involved—only the

manner of its formation. In addition to that of giving the petitioner his 'day in court,' some of the legal principles which may be involved in the formation of discretion are: Furtherance of statutory purposes, rules of construction, effect of language and opinions, common law principles, relation between courts, and constitutional rights. Such legal principles inhere in each exercise of discretion, and are in the nature of legal action * * *"

Where, as in the case at bar, it appears that the trial judge was personally biased and prejudiced against petitioners and in favor of respondents, as the result of occurrences prior to and *aliunde* the trial of the cause, and that such personal bias and prejudice was so broad, deep and strong as to impel said judge, during the subsequent purported trial of the cause, to repeatedly impune the acts and motives of petitioners and their counsel, and to continuously charge said counsel with fixing witness, subornation of perjury, and other misconduct, and petitioners' witnesses with perjury, and one of the petitioners with immorality, all without cause, provocation or supporting evidence, said trial judge on that account was disqualified to hear and determine the issues between petitioners and respondents, and to make findings of fact and render judgment in said cause, and on review of said proceedings in the Circuit Court of Appeals the said judgment and proceedings should have been set aside and vacated. Further, where in said action the petitioners against whom the said trial judge was so personally biased and prejudiced, promptly, upon learning of said prior occurrences, duly and timely filed a sufficient petition and affidavit for the disqualification of the said judge

on said ground, the said trial judge had no jurisdiction to proceed further with the purported trial, and where the said trial judge directed or permitted the truth of said acts so alleged in said petition and affidavit to disqualify to be put in issue, and evidence on said issue to be presented by the respondents on the hearing thereof, and the said judge thereupon found and concluded that said alleged acts were not true, and that the petition and affidavit were not filed in good faith, and overruled said petition and affidavit and proceeded to hear the cause, make findings of fact, conclusions of law and rendered a judgment therein against said petitioners, such proceedings and judgment were in excess of the jurisdiction of the court presided over by the said prejudiced judge, and the opinion and judgment of the Circuit Court of Appeals on appeal therefrom, wherein same were accorded the consideration, weight and presumptions of a judgment of a duly qualified judge and affirmed, same will be reviewed on certiorari from this Court.

POINT ELEVEN

That the trial judge either overlooked, ignored or disregarded all the evidence on the part of all the parties, the admissions, and stipulation on the part of respondents, as to the material and controlling facts, in refusing to approve and make findings of fact based thereon, which were duly and timely requested on behalf of the petitioners, and found other purported controlling facts in the face of all the evidence on behalf of all the parties, and the Circuit Court of Appeals overlooked and did not refer to, discuss, or decide the Point.

As appears on page 8, *supra*, the appellees', respondents' Answer Brief, filed in the Circuit Court of Appeals, V. II, p. 156, Appendix hereto, *admits that the controlling question in this case, as between the petitioners and respondents, was and is as to whether the Jackson Barnett, who was the father of Albert Brady, and the grandfather of petitioners, was the Jackson Barnett whose heirs are being herein determined.* In recognition of this fact that the decisive question was one of identity of the Jackson Barnett, who was the father of Albert Brady, as the Jackson Barnett whose heirs are being herein determined, the petitioners presented evidence, both oral and documentary as appears above, covering chronologically the birth, whereabouts, doings and family relations of Jackson Barnett, a Tuckabatchee Creek Indian, and father of Albert Brady, from the time of his birth until his death *which evidence is unchallenged, and conclusively establishes the fact that the Jackson Barnett whose heirs are being herein determined was the Jackson Barnett, who was the father of Albert Brady. Further, the evidence on the part of respondents and other parties relating to the said period of the life of Jackson Barnett, prior to his attaining the age of approximately 39 years, together with the stipulation and statements of counsel for respondents, establish said facts as to identity as appears from the following:*

1. Rebecca J. Baker and Nancy Posey, leading witnesses for respondents, testified and there was no evidence to the contrary, that said Jackson Barnett, the son of Thlesothle, and a Tuckabatchee Creek Town Indian, shortly

after the Civil War, and some time after the death of his mother, was left at the home of William McCombs, by his Aunt Jennie (Connor) Jeffrey and her husband, Uncle Jeffrey, and that they saw him there when a boy big enough to run errands (pp. 3887-3888, V. 8; 5337-5351, V. 11; 13268-13269, V. 18, Rep. Tr.). It was stipulated that said Jennie (Connor) Jeffrey was the aunt of said Jackson Barnett. (V. II, pp. 1464-1465, Clk's Tr. and pp. 39-40-50, Appellees' Brief, V. II, Appendix hereto.)

2. Not only did counsel for respondents admit during the purported trial, and in their said brief (p. 109, V. II, Appendix hereto) that the Jackson Barnett, who lived at Leecher's, was the Jackson Barnett whose heirs are being determined herein, the trial judge stated during the hearing that he believed such to be the fact (p. 8323, V. 17, Rep. Tr.).

3. The Jackson Barnett, whose heirs are being herein determined, himself, in 1912, before he became wealthy, and while the oil and gas lease, which was the source of his wealth, was being considered and approved in the County Court of Okmulgee County, Oklahoma, was brought into said court by ALBERT, no doubt, his son, ALBERT (BARNETT) BRADY; said ALBERT did not testify and his identity is not of record. At said hearing before said County Court in May, 1912, said Jackson Barnett, as was the custom with the band of "Snake Indians," to which the evidence shows he belonged, refused to answer questions as to his personal relations and affairs, and answered that he did not know, but stated that ALBERT had brought him in when

the lease was filed, and further testified that he had worked on the ferry run by an Indian about thirty or forty years prior to that time. (Pp. 60-65 of Seborn Fisher's Exhibit No. 11, p. 7, Appellants' Answer and Reply Brief, V. I, Appendix hereto.) This evidence was presented by the respondents, and in connection with the evidence of R. C. Mason, p. 8680, V. 18, Rep. Tr. shows that this ALBERT was Albert (Barnett) Brady, the son of Jackson Barnett, and that the Jackson Barnett, whose heirs are being herein determined stated he had a son named Albert who at that time, 1913, lived on his farm near Bristow, Creek Nation, Oklahoma.

Counsel for petitioners duly and timely requested in writing the trial judge to find said so-established, admitted, and stipulated facts as to the said birth, whereabouts, family relations and identity of said Jackson Barnett, during said period prior to his attainment of the approximate age of 39 years, and the trial judge refused and denied said request (pp. 604-609, V. I, Clk's Tr.; 131-135 Appellants' Brief and 2-5 Appellants' Answer and Reply Brief, V. I, Appendix hereto.)

On the other hand, what was the course of counsel for respondents and the trial judge with regard to this controlling question of identity? The most significant fact in this proceeding, other than said attacks of the trial judge and counsel for respondents upon petitioners, petitioners' counsel and witnesses, *is that counsel for respondents did not request, and the trial court did not find, and refused to find, any fact as to the acts, doings, whereabouts, family relations and identity of said Jackson Barnett occurring or*

existing prior to approximately 1891 when Jackson Barnett was about 39 years of age! It was for this most material period in the life of said Jackson Barnett concerning which no findings were requested by counsel for respondents, and the trial judge refused all findings requested on the part of petitioners relating thereto, that said Jackson Barnett, as all the evidence shows, lived first, at McCombs', then at Colbert's, where said Albert Brady, his son, was born, and then lived at Leecher's Ferry beore he lived about in the Senora, later Bryant, or Siah Barnett neighborhood. **It was only for the period in the life of Jackson Barnett, after he was about 39 years old that respondents requested, and the trial judge made findings, except that he lived in the Creek Nation, Indian Territory, which findings were correctly made and made so as to exclude the Tennessee and Kentucky claimants, who claimed that Jackson Barnett lived in Tennessee and Kentucky during said period.**

Is it not obvious that such findings of fact so requested by counsel for petitioners, which covered the birth, doings, whereabouts and family relations of said Jackson Barnett for the period prior to the time he appeared at the Senora, later Bryant, or Siah Barnett neighborhood, were based on the evidence, admissions and stipulations of all the parties, except the Tennessee and Kentucky claimants, who asserted that he lived during said period in Tennessee and Kentucky, and that any finding as to the whereabouts and family relations of Jackson Barnett during that period of his life, based upon any evidence whatsoever, would serve to show that said Jackson Barnett was the father of Albert

Brady, and the grandfather of petitioners? A sufficient reason for such failure of counsel for respondents to request findings of fact relating to said period is that same would result in a finding herein against the respondents, and in the nature of things counsel for respondents opposed and were successful in preventing any findings with relation to said period in the life of Jackson Barnett by the trial judge. A natural inquiry in determining as to whether said Jackson was the father of Albert Brady, would be as to who were the associates of said Jackson Barnett, and where did he live and what were his family relations prior to the time he attained the age of 39 years, and appeared in said Senora, later Bryant or Siah Barnett neighborhood? The findings of the trial judge are only to the effect that he lived somewhere in the Creek Nation. What reason can be suggested for the failure of counsel for respondents to request, and for the trial judge to refuse to make, any findings whatsoever relating to the whereabouts, identity, and family relations of the Jackson Barnett, whose heirs are being herein determined, prior to his attaining an age of 39 years other than the avoidance of his identification prior to that period?

Regardless of the motive for such failure and refusal on the part of counsel for respondents and the trial judge, the direct effect thereof was the arbitrary exclusion of petitioners from the case, since, as counsel for respondents state, and which clearly appears, the said identity of said Jackson Barnett during said period prior to his attainment of the age of 39 years was controlling in petitioners' case.

The fact is petitioners were not concerned with the occurrences in the life of Jackson Barnett subsequent to said period.

Supplementing the above, petitioners earnestly ask the Court to hold in mind the significant and controlling situation that all the evidence on the part of all the parties that relates to the birth, whereabouts, and family relations of the Jackson Barnett, whose heirs are being determined in this action, the greater part of which is digested above, without conflict, establishes beyond question, that said Jackson Barnett was born near Buzzard Hill, Creek Nation, in about 1852, and lived with his mother, Thlesothle, in that locality until about the beginning of the Civil War (1861); that his mother died during or about the close of said war (1865); that his Aunt Jennie and Uncle Jeffrey, when he was big enough to run errands, left him at the home of Billy McCombs; that when about grown (1872-1875), he lived at the home of Judge Joe Colbert, the uncle of Sinda Colbert; that he and Sinda lived together during that period, and had a son, Albert, in approximately 1874 or 1875; that when said Albert was about one year old, Jackson Barnett and Sinda separated; that Jackson went to Leecher's Ferry to live (1875), and Sinda took Albert and went to live with her brother; that Jackson lived at Leecher's until about 1891, when he was about 39 years of age, when he began living about in the Senora, later Bryant, or Siah Barnett neighborhood; and that later he was kidnapped and lived in different places in Oklahoma, Kansas, and California until he died in Los Angeles, California, in 1934.

The above conclusively establishes a state of facts which requires the determination of the admittedly controlling fact as to whether the said Jackson Barnett, whose heirs are being herein determined, was the father of Albert Brady, and the grandfather of petitioners, Dora Brady and Lucinda Watashe, in the affirmative, and the trial court erred in refusing to so find.

All the witnesses on the part of all the parties, including respondents except the Tennessee and Kentucky claimants, who testified as to the facts relating to the birth, parentage, whereabouts, associates and family relations of Jackson Barnett, who was the son of Thlesothle, stated that he was born and lived with his mother in the vicinity of Buzzards Hill, then at McCombs', then at Colbert's, where his son Albert was born, and then at Leecher's (Leecher's Ferry) until he was approximately 39 years of age. Also, testified that said Jackson Barnett was a Tuckabatchee Creek Town Indian and the only Indian of that name who lived in said locality, and there was no evidence to the contrary. Among said witnesses so testifying were the following:

John Catt, Rep. Tr. V. 3, pp. 1329-1330.

Ben Marshall, Rep. Tr. V. 3, pp. 1477-1478.

Ernest Gouge, Rep. Tr. V. 3, pp. 1532-1539.

Charley Barnett, Rep. Tr. V. 6, pp. 2725-2726.

Mary Fields, Rep. Tr. V. 6, pp. 2844-2845.

Taylor Bear, Rep. Tr. V. 8, pp. 3827-3828, 3831-3832, 3839-3851.

Louis Scott, Rep. Tr. V. 8, p. 3768.

Anna Beams, Rep. Tr. V. 8, pp. 3693-3709.

Rebecca J. Baker, Rep. Tr. V. 8, pp. 3887-3889, and V. 21, pp. 10044-10045.

Robert Deer, Rep. Tr. V. 8, pp. 3755, 3762.

Thompson Colbert, Rep. Tr. V. 10, pp. 4728, 4737.

Wade Kilcrease, Rep. Tr. V. 10, pp. 4757, 4760.

Robert Kelley, Rep. Tr. V. 10, pp. 4770-4771.

Louis Pittman, Rep. Tr. V. 10, pp. 4955-4958.

Jim Hutton, Rep. Tr. V. 11, pp. 5078-5097.

Sarty Cowee, Rep. Tr. V. 11, p. 5050 and V. 19, pp. 9227, 9236.

Tom Moore, Rep. Tr. V. 11, pp. 5014-5015.

Winnie Hendrex, Rep. Tr. V. 16, p. 7816.

George Scott, Rep. Tr. V. 17, pp. 8200-8203, 8206.

Jim Alexander, Rep. Tr. V. 19, pp. 9313-9316.

Ellen Smith, Rep. Tr. V. 19, p. 9259-N.

Nancy Posey, Rep. Tr. V. 25, p. 13268, and V. 11, p. 5337, same.

John A. Jacobs, Rep. Tr. V. 25, pp. 13263, 13276 and V. 6, pp. 2670-2673.

Nathan Williams, Rep. Tr. V. 25, pp. 13206-13218.

Lucy Scott, Rep. Tr. V. 25, p. 13247.

Three witnesses, who personally knew who were the parents of Albert (Barnett) Brady, testified in this proceeding, that said parents to their own knowledge were Jackson Barnett, a Tuckabatchee Creek Town Indian, and

Sinda Colbert, a Hickory Ground Creek Town Indian, as follows:

Thompson Colbert, Rep. Tr. V. 10, pp. 4728-4737.

Mary Davis, same, pp. 4794-4795.

Robert Kelley, same, pp. 4766-4767.

Wade Kilcrease, same, pp. 4749-4760.

That said Jackson Barnett, the father of Albert (Barnett) Brady and grandfather of petitioners, Dora Brady and Lucinda Watashe, was living long subsequent to 1900 when counsel for respondents contend he was dead, was the substance of the evidence of the following uncontradicted and unimpeached witnesses:

Dora Brady, p. 4982, V. 10, Rep. Tr. and V. 18, p. 8651.

Jacob Canfield, pp. 4916-4921, V. 10, Rep. Tr.

Mary Davis, pp. 4791-4795, V. 10, Rep. Tr.

Lon Hall, pp. 4857-4859, V. 10, Rep. Tr.

Hugh Hale, pp. 4898-4900, V. 10, Rep. Tr.

Robert Kelly, pp. 4773-4775, Rep. Tr. V. 10.

Susie Lawson, pp. 4839-4848, V. 10, Rep. Tr.

Della Hale, pp. 4904-4909, V. 10, Rep. Tr.

Lucille Hiatt, pp. 4814-4819, V. 10, Rep. Tr.

Nora Pearson, p. 4879, V. 10, Rep. Tr.

Mrs. Lee Phillips, pp. 4827-4835, V. 10, Rep Tr.

R. C. (Colbert) Mason, pp. 8675-8696, V. 18, Rep. Tr.

C. M. Allen, pp. 8715-8726, V. 18, Rep. Tr.

The references to the volume and page of the evidence

of witnesses, contained in the Petition and Brief herein, are not furnished with the expectation that the Court will refer to same in the record, as the substance thereof is digested herein, and counsel for respondents, through the use of said references, may conveniently point out any misstatements herein as to the substance of said evidence.

It is true that the rule is that this Court will accept the findings of the trial court and the Circuit Court of Appeals based on conflicting evidence, unless it clearly appears that said courts erred as to the effect of the evidence; however this rule does not apply in the case at bar as is demonstrated in the Petition for this Writ, in this Supporting Brief, in the briefs of these petitioners, as appellants, and respondents, as appellees, filed herein in the Circuit Court of Appeals (Vols. I and II, Appendix hereto) for the following reasons:

1. That the trial judge was disqualified on account of evident personal bias and prejudice against petitioners and in favor of respondents to conduct said hearing and make said purported findings and conclusions and enter the judgment herein, and that the said qualification of the said judge so to do had been theretofore challenged by petitioners in timely filing and presenting a sufficient petition and affidavit to disqualify said trial judge on account of said personal bias and prejudice, and that the action of the said trial judge in thereafter proceeding with the said hearing and purporting to make said findings and conclusions and *to enter the judgment herein was in excess of jurisdiction of said trial court herein.*

2. That the findings in substance that petitioners were

not the granddaughters and heirs of the said Jackson Barnett, deceased, is contrary to the evidence and not supported by any evidence as is clearly evidenced in the record and briefs above digested and cited.

3. That the Circuit Court of Appeals in affirming the said findings and the judgment herein on the ground that same are "supported by substantial evidence implemented by the stipulation referred to, and are not clearly erroneous, due regard being given to the opportunity of the trial court to judge of the credibility of the witnesses and the weight to be given to their testimony," overlooked the fact that the said trial judge was disqualified on account of said personal bias and prejudice to hear, consider, and determine the issues presented, and that on that account said findings and conclusions of the said trial judge were not entitled to the consideration accorded same in the Circuit Court of Appeals, and that *the implementing stipulation referred to was between counsel representing collateral claimants and did not relate to the case of petitioners, who are lineal descendants of Jackson Barnett and without interest in the subject-matter of said stipulation, and that the "many sharp inconsistencies and irreconcilable conflicts in the evidence" related only to the collateral claimants and not to the case of these petitioners.* The fact is, as is herein demonstrated, the opinion of the Circuit Court of Appeals herein relates almost exclusively to issues and questions presented only in the appeals of collateral claimants, and only incidentally to the appeal of these petitioners, who are the direct descendants of said Jackson Barnett, deceased.

POINT TWELVE

The finding and conclusion of the trial court that Jackson Barnett "from his youth up had been and was an incompetent; that he was weakminded, and generally known as 'Crazy Jack,' and that he had never at any time had sufficient mental capacity to enter into a valid marriage contract" (pp. 728, 737, V. II, Clk's Tr.) is contrary to all the evidence on the part of all the witnesses presented by all the parties, referred to and digested above, and *which is in substance that Jackson Barnett was an average Indian boy and man until after he left Leecher's Ferry in 1891, when about 39 years of age, and thereafter became a roving, shiftless "Snake Indian" and lived about from place to place.* Pp. 13-14, *supra,* and volumes of record therein cited; and pp. 9-41, Appellants' Brief, V. I, Appendix hereto.

POINT THIRTEEN

That the said findings and conclusion of the trial judge that there was no evidence that the parents of Albert (Barnett) Brady, Jackson Barnett and Cinda Colbert, were married, and the inference therefrom that "the said Lucinda Watashe and Dora Brady, the children of said Albert Brady, are not the next of kin and heirs of said Jackson Barnett, Creek Roll No. 4524, whose heirs are being determined herein," and that he was "weakminded and generally known as 'Crazy Jack,' and that he never at any time had sufficient mental capacity to enter into a valid marriage contract" (p. 31, *supra*), aside from the fact that same is con-

trary to all the evidence, as is demonstrated above, are erroneous for two additional reasons: First, as is presented on pages 124-125, above, since the enrollment record of Albert Brady shows that Jackson Barnett and Cinda Colbert were the parents of said Jackson Barnett, the presumption is they were married, and that he was legitimate, and, second, admitting for argument, although not the fact, that at the time said Jackson and Cinda lived together and Albert was born, said Jackson Barnett was incompetent, still after the death of Jackson Barnett and Cinda Colbert, their marriage cannot be successfully attacked in an effort to show the illegitimacy of the offspring of same. *Hunt* v. *Hunt et al.*, 23 Okla. 490, 100 Pac. 54; *Hughes* v. *Kano*, 60 Okla. 202, 173 Pac. 447; Sec. 677, O. S. 1931; *Ross* v. *Ross*, 175 Okla. 633, 54 Pac. (2d) 611; pp. 174-177, Appellants' Brief, V. I, Appendix hereto.

The Circuit Court of Appeals overlooked and did not discuss or decide this controlling point.

POINT FOURTEEN

That the said finding by the trial judge "that neither Albert Brady, Mary Fisk, his wife, nor Dora Brady, ever made any effort to cause him * * * (Jackson Barnett) * * * to have any relief, although now it is attempted to be made to appear that they had an interest * * * it was known by them that Jackson Barnett was in distress as disclosed by Exhibit 'I' in evidence * * *" p. 714, V. II, Clk's Tr.; pp. 21-22, *supra*, is fairly indicative of the feeling and state of

mind of the trial judge toward petitioners. The uncontradicted evidence of all the witnesses of all the parties who testified in relation to this matter, and which evidence is digested above, is contrary to the said finding, and shows that Albert and Dora Brady had the said exhibit in their possession in 1917 and discussed their said father and grandfather with their neighbors, and there is no fact or circumstance supporting said finding. Said Brady Exhibit "I" is a lengthy newspaper account, published September 2, 1917, of the alleged treatment of Jackson Barnett by the officers and representatives of the Interior Department relative to the handling of his great estate, and a facsimile of same is presented in full on pages 122-123 of appellants' brief, V. I, appendix hereto, and the Court is respectfully requested to examine same and consider same in connection with the above finding. It is believed that the conclusion must be that the mind of the trial judge was necessarily biased and prejudiced against the petitioners.

While this Court soundly stated in the opinion in *Berger* v. *United States, supra,* that "* * * To commit to the judge a decision upon the truth of the fact (as to the truth of the facts alleged) gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision that a disposition of a mind in which there is a personal ingredient * * * " *it must follow that where "the evil against which the*

section is directed" has in fact occurred, and a judgment is erroneously entered by the disqualified judge, and the said proceedings and judgment of the disqualified judge on appeal therefrom are "fortified by presumptions" on said appeal by being accorded the weight and consideration due those of a disqualified judge, that this Court will in the exercise of its sound discretion, and the performance of one of its elementary functions review said proceedings and judgment through the issuance of a writ of certiorari.

Respectfully submitted,

CHAS. E. MCPHERREN,
442 Key Bldg.,
Oklahoma City, Oklahoma,
Attorney for Petitioners.

December, 1941

⊙

Office - Supreme Court, U.
FILED
JAN 7 1942
CHARLES ELMORE CROP
CLER

(2)

Brady v B.

No. 846

In the Supreme Court of the United States

October Term, 1941.

JOE H. TIGER, *ET AL.*, *Petitioners*,

vs.

ANNIE BEAMS, *ET AL.*, *Respondents.*

UNITED STATES OF AMERICA, *Intervener.*

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

NORMAN L. MEYERS,
JAMES D. SIMMS,
Attorneys for Petitioners, Joe Tiger, et al.;
PAUL PINSON,
Attorney for Lucy Carns and Ellis Gentry.

INDEX.

PAGE

Caption 1
Opinions below 2
Jurisdiction 2
Questions presented 2
Facts 4
Specifications of error 12
Reasons for granting the writ 13
Conclusion 21

Table of Cases.

Barnett v. Equitable Trust Co., 21 F. (2d) 325, 26 F. (2d) 350, cert. den. 278 U. S. 626 4
Barnett v. United States, 82 F. (2d) 765, cert. den. 299 U. S. 546 4
Hegler v. Faulkner, 153 U. S. 109 ..... 4, 18, 19, 21
Kimberlin v. Commission, 104 Fed. 653, 44 C. C. A. 109 21
McGugen v. United States, 109 F. (2d) 94 4
Norton v. Larney, 266 U. S. 511 21
Tiger, et al., v. Beams, et al., 122 F. (2d) 777 ..... 12, 21
United States v. Mott, 37 F. (2d) 860, 283 U. S. 747 .. 4

Miscellaneous.

Act of Congress of March 3, 1903, 32 Stat. L. 982 21
Reports of the Commissioner of Indian Affairs, June 30, 1904, and June 30, 1905 21
U. S. C. A., Title 28, Sec. 347 2

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1941.

No. .....

JOE H. TIGER; ANNIE PONDS; ALEX HAMILTON, Administrator of the Estate of Peter Hamilton, Deceased; Lucy Curns and J. Ellis Gentry, *Petitioners,*

vs.

ANNIE BEAMS; MELVINEY BARNETT DITZLER; THE Estate of Nellie Barnett, Deceased; The Estate of Jimmy Barnett, Deceased; Mahaley Fish Hickman; Winey Fish Lewis; Katie Fish Litzey; Frazier Fish; Milley Fish Gilroy; Charity Buckley, formerly Smith; William Fisher; Mariah Fisher Tompkins; Lewis Fisher; Rosa Fisher; Frances Sutton, *nee* Fisher; Marion Stevens, *nee* Fisher; Lawrence H. Fisher; Susie Conner; the Heirs of Emma Burgess, *nee* Conner; Jim Burgess, Husband, for Himself and as Next Friend of His Minor Children; William Burgess, Little John Burgess, Sissie Burgess and Noah Burgess and Joe Burgess, Adults; May (or Hannah) Conner; Carrie Hendrix, now Ryan; Norman Hendrix, and Richenda Pratt, now Smith; Rebecca J. Baker; Katie Williams, *nee* Knight; The Heirs of Lois Williams, Deceased; Marcellus L. Williams, a Minor; John F. Davis; Lucy Knight; Bamma Bear; Abbie Cosar, *nee* Conner; Willie Conner; John Conner; Chissie Stepney; Barney Stepney; Rhoda Gouge, *nee* Stepney; Ida Gouge, a Minor; Eliza Gouge, *Respondents.*

UNITED STATES OF AMERICA, *Intervener.*

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Norman L. Meyers and James D. Simms, on behalf of Joe H. Tiger, *et al.,* and Paul Pinson, on behalf of Lucy

Curns and Ellis Gentry, pray that a writ of *certiorari* issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered in the above case on September 2, 1941, affirming the judgment of the United States District Court for the Eastern District of Oklahoma.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 122 F. (2d) 777 (1941). The decision of the United States District Court for the Eastern District of Oklahoma is unreported; its findings are in the record at page 1005.

Jurisdiction.

The judgment to be reviewed was entered on September 2, 1941. A petition for rehearing was denied on October 10, 1941. The jurisdiction of this court is invoked under section 240 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., title 28, Sec. 347).

Questions Presented.

1. Whether the appellants, of Negro blood, were deprived of a hearing in accordance with due process of law guaranteed by the Fifth Amendment to the Constitution of the United States because of prejudicial racial discrimination by the trial court which

a. Approved prior to trial an agreement (for mutual defense and offense) entered into by prevailing claimants "if it was a contract among restricted Indians to defeat the claims of Negroes and other non-citizen claimants;"

b. Made repeated statements that it would not believe Negroes or pay any attention to evidence of Negro claimants;

c. Usurped the function of attorneys for appellants and other parties of Negro blood in the cross ex-

amination of opposing witnesses and even in direct examination of witnesses;

d. Prejudiced the case and indicated such anti-Negro bias as to preclude judicial appraisal of the credibility of the witnesses of Negro blood and the weight to be given to their testimony.

2. Whether the active partisan participation of the Assistant United States Attorney on behalf of the prevailing claimants in this private litigation using in defiance of instructions his official position to sponsor witnesses for the prevailing claimants and to intimidate all others with threats of grand jury prosecutions interfered with due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

3. Whether the partisan activities of a Special Agent of the Federal Bureau of Investigation, working solely during the trial with the prevailing claimants in the preparation of their witnesses against other claimants, was so prejudicial as to be a violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

4. Whether the contract between the three prevailing groups of claimants in which they stipulated that they are a family related to each other and to Jackson Barnett and agreed to share whatever spoils any group obtained in this action, is void and contrary to public policy, conducive to perjury and the suppression of evidence, and improperly "implemented" the record in behalf of the Three Groups, patently influencing both courts below.

5. Whether the notation by some clerk on the census card of Jackson Barnett that one Siah was his father was competent and vital evidence, as held by both the lower courts, or was a mere collateral and incidental matter, pure

hearsay and incompetent for any purpose as held by this court in *Hegler* v. *Faulkner,* 153 U. S. 109.

6. Whether the findings of the District Court, affirmed by the Circuit Court of Appeals for the Tenth Circuit, are not clearly erroneous, without support of substantial evidence, due regard being given to the effect of the prejudicial anti-Negro bias of the trial court on its judging of the credibility of witnesses, and contrary to undisputed, unimpeached record and oral evidence not inherently improbable.

7. Whether the finding in 1903 by a *quasi*-judicial tribunal authorized by Congress to determine the heirs of Siah Barnett is final and binding as a judgment that Siah was not the father of Jackson, the decedent.

Facts.

1. This is a proceeding to determine the heirs of Jackson Barnett. Barnett, a Creek Indian, died in 1934 the possessor of a large estate from oil discovered on land allotted to him out of the lands of the Creek Nation. Wealth came to Barnett late in life long after he had severed family ties in his wanderings through Oklahoma and Kansas. In the last years of his life he lived in California where he purportedly married one Anna Laura Lowe Barnett. Through action by the Department of the Interior large gifts to this wife and to a mission society were invalidated, *Barnett* v. *Equitable Trust Co.,* 21 F. (2d) 325, 26 F. (2d) 350, *certiorari* denied 278 U. S. 626; *United States* v. *Mott,* 37 F. (2d) 860, 283 U. S. 747; *McGugen* v. *United States,* 109 F. (2d) 94; and the purported marriage was declared invalid, *Barnett* v. *United States,* 82 F. (2d) 765, *certiorari* denied 299 U. S. 546.

2. Various actions for the determination of the heirs of Barnett were transferred to the United States District Court

for the Eastern District of Oklahoma and were consolidated into this action. This was done at the instigation of the Department of the Interior which has taken the position of neutral stakeholder. Some 50 groups of claimants totalling approximately 600 persons became parties to the action, claiming heirship and to be entitled to all or part of the estate. There was dispute as to who was the father of Barnett, and likewise there was dispute as to the identity of Thlesothle, his mother. There were likewise claims of alleged wives of Barnett and their offspring.

3. Petitioners claim the mother of Barnett was Thlesothle, a full-blood Indian who had six sons. Petitioners, Joe Tiger, *et al.*, admittedly part Negro, trace descent from two of the claimed brothers of Jackson Barnett. The other members of the family died without issue.

4. The petitioners, Lucy Curns and Ellis Gentry, assert that their grandfather, Andrew Sullivan, a former Negro slave in the Creek Nation,* was the father of Jackson Barnett and that they are the daughter and son respectively of a paternal half-sister of Jackson Barnett.

5. The successful claimants are Three Groups of claim-

---

*The names "Andrew" and "Jackson" naturally appear in the Barnett family of Creeks. This results from the friendship of a part Scotch and part Indian family named Barnard for "Old Hickory" during the Creek Indian wars. The decimation of the Creek forces resulted in marriage and cohabitation between Negro slaves and Creek women, both in Alabama and in Oklahoma, where the Creeks and their slaves were later transported. Such marriages were recognized by the Creeks as indicated by their own records from the year 1832 until 1859, when miscegenation was proscribed. Andrew Sullivan was a son of Quince Barnett, but took the name Sullivan by reason of his having been in Alabama a slave of the Sullivan family. Jackson, the son of a full-blood Indian woman, took the actual family name of his father. Tecumseh, also the son of Andrew Sullivan and Thlesothle, used his father's first name and was enrolled as a Union soldier under the name "Tecumseh Andrew."

ants (Siah Barnett Group, Conner Group and Stepney-Gouge Group), who have entered into a so-called family settlement agreement. (Clerk's Tr., Vol. 1, p. 481.) Prior to the agreement the Three Groups were antagonistic and had taken depositions under oath of numerous witnesses, each group challenging the relationship of the others to Jackson Barnett. By the agreement they stipulate to the issue in this action, namely that they are related and are a family all related to Jackson Barnett. Each of the Three Groups claimed in a different degree, so that no two groups under any set of favorable facts could possibly recover. The adverse nature of the claims of the Three Groups lay not in the fact that each of them claimed to be next of kin, *but that each of them claimed that the others were not related at all.* By the contract the Three Groups entered into an alliance of offense and defense and agreed that *if any group prevailed all were to share* in the spoils according to a fixed schedule. The Three Groups became a family by stipulation in a case where the sole issue to be determined by the court was that of family relationship.

This proposed contract between restricted Indians was submitted to the Secretary of the Interior for approval. The Acting Secretary expressed doubt as to the power of the department to approve, and suggested that the approval of the contract might embarrass or prejudice the other parties in this action. The proposed contract was referred to the Department of Justice who forwarded it to the Assistant United States Attorney participating in this case who had been instructed to act merely as the neutral representative of the Government as the stake-holder.

By his own admission the Assistant United States Attorney was an advocate of the Three Groups. (R. 8499-8502) He presented the proposed contract, prior to the trial, to

the trial court and discussed the matter at length. The court expressed the opinion that "if there were a combination or agreement between full-bloods to make a joint effort to defeat the claims of the Negro claimants, as wife and children or other non-Indian claimants, that this probably would not be against public policy." (Curns Exhibit 43.) Subsequently the Acting Secretary of the Interior did approve the contract with the express condition that such governmental approval of the contract should not be construed as a recognition by the Department that the parties to the agreement, or any of them, are in fact the rightful heirs of Jackson Barnett. Despite this position taken in Washington, the Assistant United States Attorney in Oklahoma, without authority of the Attorney General, actively promoted the claims of the Three Groups as though their case was the Government's. (R. 8500-8501) Despite some protestations somewhat to the contrary, the trial court treated the departmental approval as a determination in favor of the Three Groups as the rightful heirs.

6. Both in the conduct of the trial and in his findings the trial court demonstrated he was materially influenced by the so-called census card of Jackson Barnett No. 1419 (Curns Ex. 26). This card was prepared by an unknown employee of the Dawes Commission (The Commission to the Five Civilized Tribes), which was commissioned to determine certain facts and to prepare rolls of citizens by blood and of freedmen citizens. These rolls were prepared from information gathered by a field staff in memoranda on cards. The official approved rolls contain no information or findings as to the parentage. However, card No. 1419 did state "Siah"* was the father and listed Jackson as a "full-blood."

*Other rolls, ignored by the trial court, list Siah as part Negro.

Uncontradicted testimony by Wm. O. Beall, a prominent attorney, and a former member of the field staff of the Dawes Commission, demonstrated that the date on the cards were obtained informally and casually. When individuals were not interviewed personally, information was sought from relatives or neighbors or town tribal rolls. Old rolls were checked; if no information concerning anyone named on these rolls was obtained, such person was arbitrarily listed as dead. No attempt was made to verify the information obtained. As the parentage or degree of blood was immaterial for the purposes of the enrollment, the field staff accepted whatever information was offered as to such matters.* (R. 8372, *et seq.)*

This card is the only documentary record which supports the contention of the Three Groups that a "Siah" was the father and that Jackson was a full-blood. The trial court seized upon this record as practically conclusive that Siah was the father, and that Barnett was a full-blood. As each witness, especially of Negro blood, testified, the trial court openly derided parol evidence and demanded record evidence to refute the census card.** Opponents of the Three Groups contended that the census card was incompetent as hearsay of hearsay from an undisclosed source. The Circuit Court found it was admissible in evidence and entitled to appropriate consideration along with all other evidence. But it was not so treated by the trial court.

7. The trial court persistently throughout the trial evidenced a bias against all claimants and witnesses other than

---

*As an illustration the witness recalled the case of Jack Ellis, a quarter-blood Cherokee, who stated he was a full-blood Indian. This statement was accepted and he was so listed on his card. (R. 8407)

**The court stated (R. 1443), "I am just telling you there ain't anybody going to get a finding in their favor on just general talk around, unless they go trace back to some record."

those for the Three Groups, especially persons of Negro blood. The court in finding against petitioners extends itself to brand petitioners (Joe H. Tiger and Annie Ponds) as full-blood negroes despite the showing by every record introduced on their behalf or against them that they are a son and daughter respectively, of a full-blood Indian, and claim collateral relationship to Jackson Barnett through their father and not through their mother who had Negro blood. In another instance, petitioner Lucy Kurns, admittedly part negro, asserted in response to the court's inquiry, that she had a little Indian blood. Without evidence, without hesitation, the court stated for the record a finding then made that she was a full-blood Negro and had no Indian blood in her veins (R. 4086), and added in substance that *he should not be expected to believe the statements of Negro claimants.* (R. 4086-4088) In regard to testimony of statements of deceased persons with reference to the family history of one of the Negro families, the court said, "I always let them put that stuff in and not pay attention." (R. 4077) The court evidently ignored all evidence of such witnesses.

Further, the court harassed attorneys for the claimants other than the Three Groups, interfering both with the direct examination of witnesses, (R. 4077-4088, R. 4147, R. 1400, R. 4766-4773, R. 4870, R. 4995-5008), and curtailing and preventing adequate cross examination of opposing witnesses. A typical example is the case of a claimant, Lucy Curns, 74 years of age, whose examination the court took over and subsequently in a night session permitted cross examination by nine attorneys, of whom no less than three represented one group of claimants involved in the contract. On the other hand, when the witnesses were for the Three Groups, the court interfered with cross examination and even compelled cessation of cross examination. (R. 3731-3735, R. 2826, R. 3659)

8. The Assistant United States Attorney, even prior to the trial, abandoned a neutral position and threw the weight of his office behind the Three Groups. (R. 8499-8500). In October, 1936, he urged upon the court, the Department of Justice and upon the Department of the Interior, the approval of the contract between the Three Groups. He stated he was convinced that the Three Groups should prevail and that the approval of the contract "would materially assist in properly presenting the claims of these full-blood Indians." (Clerk's Tr., Vol. 1, 499-501.) This was prior to the presentation of evidence before the court by petitioners or other claimants opposed to the Three Groups. The only data upon which the United States Attorney made his decision consisted of depositions taken on behalf of the Three Groups and "other information available" to him *(Ibid.)*, obtained presumably in his discussions with the many politically prominent attorneys for the Three Groups. As a federal official, he made an *ex parte* presentation of the case of the Three Groups to the Court prior to hearing of evience for any claimants.

During the trial the Assistant United Atates Attorney actively cooperated with the attorneys for the Three Groups, recalled and examined witnesses to bolster the case for the Three Groups (R. 4293), and when entrusted by the court to prepare findings, adopted those of the Three Groups *verbatim.* (Clerk's Tr. Vol. I, p. 657)

The court repeatedly made threats of grand jury prosecutions. The question of such prosecution was raised by the Assistant United States Attorney. (R. 8529) This federal officer, admittedly partisan, had the power to call and advise grand juries; inasmuch as he accepted and conceded the reliability of the evidence for his claimants, the threat of prosecution was obviously leveled solely at witnesses op-

posing the claims of the Three Groups. These threats were fulfilled; numerous indictments were returned, *before the decision.* The only witnesses indicted had opposed the Three Groups.

9. A special agent for the Federal Bureau of Investigation appeared in the case and was much in evidence in the court room. He worked solely with the attorneys for the Three Groups. He and an attorney for the Three Groups cross examined witnesses in the offices of the attorney. Expenses were paid by the attorney. The Special Agent conferred only with attorneys for the Three Groups. (R. 4322) The court sustained a refusal by the Special Agent to divulge the reason for his presence. (R. 8574) An offer of proof was made to the effect that the Special Agent had been brought into the case through the personal request of a counsel for the Three Groups, through Senator Thomas of Oklahoma, a close friend of the counsel and of the trial court. (R. 8574; R. 8572; R. 8579)

10. Most of the contradictions and confusion in the evidence, as well as in the mind of the court, arise from a fact recognized by the court itself, that there were two Jacksons in the picture up to about 1898. The evidence shows that one was at Billy McCombs' house just after the Civil War, as a little boy. The record shows that this one died in 1898, leaving surviving as his grandchildren, Dora Brady and Lucinda Watashe. The three groups say that this Billy McCombs Jackson was the son of Siah and Betty Conner, and lived until 1934, and is the Jackson in controversy. The undisputed record and oral testimony shows that Betty Conner was born after the Jackson in controversy.

Petitioners claim that the Jackson Barnett involved was the son of Thlesothle, a sister of John Leecher, and lived with his mother, his uncle and his brothers at Leecher's

Ferry throughout his early youth and manhood, and until he was about fifty years old. That he lived at Leecher's Ferry is not only shown by the evidence of some sixty witnesses, it is admitted by all parties to the case.

The trial court finds that Jackson was a resident neither at Billy McCombs, nor at Leecher's Ferry; thus establishing a personality impossible to identify by record or oral testimony. From 1892 he lived near Bryant, until he went to California; but his early years, of course, furnish the appropriate evidence with respect to the kinship of the deceased. The court makes no finding with respect to his residence until he was past middle age; but proceeds to find for the three groups in accordance with their "family agreement."

The Circuit Court of Appeals, faced with "sharp inconsistencies and irreconcilable conflicts in the evidence" upheld the trial court on the ground that there was substantial evidence "implemented by the stipulation" to support the findings. (122 F. (2d) 777, 782)

Specification of Errors.

The Circuit Court of Appeals erred:

1. In failing to find that petitioners were deprived of a hearing in accordance with due process of law because of racial discrimination shown by the court and the partisan participation of the Assistant United States Attorney and a Special Agent for the Federal Bureau of Investigation, influencing the court on behalf of the prevailing Three Groups of claimants, and intimidating witnesses of those opposed to the Three Groups.

2. In interpreting the facts concerning the agreement between the Three Groups so as to hold that the agreement was not contrary to public policy and void.

3. In holding that a census card prepared in the process of perfecting the rolls for the Dawes Commission was admissible and that the trial court was not in error in ruling that the incidental, unverified collateral data on the census card requires "clear, cogent and convincing evidence to the contrary" to overcome such data.

4. In holding that the findings are supported by substantial evidence, "implemented by the stipulation" or agreement, and cannot be disturbed on appeal.

5. In holding that a judgment and decision of the Indian Department in the year 1903 upon the question of who were the heirs of Siah Barnett is not a final judgment, though such Department was specially authorized by Congress to determine the said question and although the prevailing parties herein or their ancestors accepted money under said decision.

Reasons for Granting the Writ.

1. The Bill of Rights contains no more fundamental guarantee than that of due process of law for every person. The trial of this case in the United States District Court discloses a flagrant lack of that due process to which petitioners are entitled. Petitioners are poor, illiterate descendants of Freedmen and citizens of the Creek Nation who claim to be lawful heirs of Jackson Barnett, an Indian ward of the Federal Government. A large estate is in the hands of the Federal Government for distribution. In the legal determination of their claims to this federally held estate, petitioners' constitutional rights have been trampled upon and they must look to this court for protection.

Three competing groups of Indian claimants represented by a large number of powerful lawyers have conspired together to lay a joint claim to the estate. One group changes

its claims—to fit those of its allies. A witness testifies in court contrary to testimony under oath in depositions prepared prior to the agreement—to support the claims of the new allies. Evidence challenging the claims of the others is suppressed—to cooperate with the new allies. *(Supra.)*

The Assistant United States Attorney is enlisted in support of the new allies. He, in the guise of a governmental official, persuades the trial court to approve the contract and talks of perjury by Negro claimants. *(Supra.)* The trial court approves the contracts in advance of hearing evidence because "it was a contract among restricted Indians to defeat the claims of Negroes and other non-citizen claimants." In the course of the trial the Assistant United States Attorney is the active protagonist of the new allies despite the official stand of the Government that he merely represents the neutral stake-holder. A Special Agent of the Federal Bureau of Investigation is imported to work with the new allies. Threats of grand jury prosecutions, the threat of the United States Attorney, the intimidation by the "FBI man"—against all but the protected allies. And the trial court itself having approved the contract, repeatedly indicates bias against the Negro claimants, usurps the function of their attorneys in conducting their own examination and protectively interferes in the cross examination of the witnesses for the three allies.

The Circuit Court found itself constrained to find it was bound by the findings of the trial court* because there was support of substantial evidence, *(1)* "implemented" by the agreement between the allies and *(2)* giving opportunity of the trial court to judge the credibility of the witnesses

---

*The trial court was Judge R. L. WILLIAMS, Circuit Judge sitting by assignment as District Judge.

and the weight to be given to their testimony*. But *(1)* the agreement had been approved by the Department of the Interior specifically on condition that it *not* be taken to implement the evidence of the Three Groups. And *(2)* the opportunity for the trial court to judge the credibility of the witnesses was vitiated by the racial discrimination stimulated in large measure by the agreement "among restricted Indians to defeat the claims of Negroes * * * ."

This is not a case for the simple application of Rule of Civil Procedure 52 (a) as found by the Circuit Court. The fundamental rule of due process is in issue. The constitutional issue is properly before this court.

2. The Circuit Court was misled in respect to the actual contentions of the Three Groups, parties to the agreement and approved a contract which under the true facts should be found void as against public policy. The Circuit Court thought that (p. 16) "The persons constituting each group claimed to be nearest and next of kin to the decedent" and "while they had become convinced that the persons constituting each of the other two groups were related to the decedent, the persons constituting each group still contended that they were the next and nearest of kin and were therefore entitled to the estate." These statements are not sustained by the record. No assertion was ever made at any time by any one of the Three Groups as against the others that any relationship existed except the third degree for one group, the fourth degree for the second, and the fourth

*The Circuit Court (p. 24), was critical of some of the statements of the trial court and of its interference in the examination of witnesses. It excused it because of the provocation of certain attorneys. Petitioners hold no brief for other claimants or their attorneys. But petitioners do point out that the activities of the trial court which were criticized tend to color the court's judgment as to the credibility of witnesses.

once removed for the third. Prior to the agreement each group had denied the claim of the others to relationship to Jackson Barnett at all.

On the basis of the facts as the Circuit Court understood them it concluded that the agreement was in the nature of a typical family settlement and as such found it valid. As a matter of fact the agreement created a family by stipulation. The Three Groups abandoned the case each had prepared to demonstrate to the court that the others were in fact not related to Jackson Barnett.

These being the true facts, the agreement between the Three Groups inherently tends to invite or promote interference with full and impartial justice in an action in which the court is called upon to determine the issue resolved by the Three Groups in their own favor by stipulation. The agreement violates public policy and was void in its inception. The agreement was conducive to perjury and whether or not it was for the purpose of withholding evidence it in fact did keep from the record evidence damaging to the Three Groups which adversely affected other claimants. The effect of the agreement on testimony is readily apparent in the case of Rebecca Baker. (R. 10027) In a deposition prior to the agreement this witness swore that nobody knew who the father of Jackson Barnett was (R. 10055), a vital point of contention between the maternal and paternal groups. After the agreement this same witness testified that Siah Barnett was the father. (R. 3896) Prior to the agreement many depositions had been taken to disprove the rival claims of these groups; as a result of the agreement neither these depositions nor the testimony of their makers was put into the record. Had this evidence, peculiarly in the hands of the Three Groups, been made available to the court it may well have caused a contrary decision by the court.

A comparison of the pleadings of the maternal groups when they acted independently with the findings requested by them after the agreement indicates a complete change of story. The Conner Group (R. 211-218) plead that Thlesothle was unmarried, and had only one child—Jackson. It requested findings that Thlesothle not only was married to Siah Barnett but also the mother of several children. The two groups claiming under the alleged mother also pleaded that Siah Barnett was estopped, as were his heirs, to claim that Siah was the father of Jackson because of the judgment and decision of the Indian Department in the so-called Loyal Creek claim asserted by Siah in 1869 and completed by payment to the heirs after a decision as to the heirs in 1903. These assertions were also abandoned after the contract was entered into.

This contract constituted an agreement among these persons "not to oppose each other"; it is a fictitious claim of relationship opposed to prior claims; it is in no sense an admission of family relationship but a diplomatic abandonment of properly asserted claims for the sake of harmony and to obtain an advantage over all other claims.

The agreement is contrary to public policy primarily because it achieves exactly what the Department of the Interior feared and tried to prevent. Despite the Department the agreement became the most potent "evidence" for the Three Groups. Despite lip service to the contrary the trial court considered the agreement in the nature of an administrative determination of the heirship. The Circuit Court of Appeals specifically finds substantial evidence only when "implemented by the stipulation" sufficient to support the findings of the trial court.

This agreement was the core of the prevailing claimants' case. Through the agreement it rallied the support of

the Assistant United States Attorney and obtained the services of the F. B. I. for private purposes. Through these channels it won the confidence of the trial court. All by stipulating to the issue. Had these Three Groups been put to their proof, the entire record would have been vastly different.

3. Second in importance in the framework of the rulings of the trial court only to the agreement was the weight placed upon the census card in the records of the Dawes Commission. In this connection the trial court violated the rule set down by this court in *Hegler* v. *Faulkner,* (153 U. S. 109). The census card, of all the documentary evidence, was the only record to state that "Siah" was Jackson's father, and to state further that Jackson was a full-blood. Both items of information were only collaterally and incidentally in question in the inquiry of the Dawes Commission. The duty of this Commission was to prepare a list of living Indians and Freedmen to be allotted land. The actual rolls prepared in the exercise of this *quasi*-judicial function in fact did not include the details mentioned above. The record discloses that this collateral data was at best hearsay on hearsay. *(Supra.)* But it tended to support the stipulations between the Three Groups. The trial court made it the touchstone for all testimony by claimants of Negro blood claiming relationship to Jackson Barnett. The court took the statement on the card that Barnett was a full-blood Indian as practically conclusive* and challenged and disregarded oral evidence to the contrary as not being "clear, cogent or convincing evidence" in the face of this card. On the basis of this card the court constantly asserted that Negroes could not be related to Barnett, a full-blood.

---

*Despite the fact that other records show Siah, the alleged father, to have Negro blood, etc. See *supra.*

Upon protest that this card was incompetent evidence for any purpose, that it is merely a memorandum by an employee of the Dawes Commission of hearsay on hearsay from an undisclosed source, the Circuit Court held that such incidental and collateral statements were admissible "for appropriate consideration." The trial court, however, considered this hearsay as practically conclusive. In conflict with the decision of this court in *Hegler* v. *Faulkner*, 153 U. S. 109, this action of the trial court, acquiesced in by the Circuit Court, again demonstrates the wisdom of the *Hegler* decision. The Acts of Congress involved in the *Hegler* case are almost exactly analogous to that setting up the Dawes Commission. In that case this court said:

> "A judgment is not evidence of any matter to be inferred by argument therefrom or which comes *collaterally* in question or is *incidentally* cognizable. * * * Our conclusion is that the court below did not err in excluding the list offered * * * (p. 655) filed in the Office of Indian Affairs containing the names and ages of half-breeds * * * to prove the age of one of said Indians."

Had the trial court properly appraised this single piece of "evidence," that alone would have vitally affected the conduct of this trial.

4. Apart from approving the agreement which it considered "implemented" evidence for the Three Groups and apart from condoning the use to which the Census Card No. 1419 was put by the trial court, the Circuit Court of Appeals erred in standing simply on the substantial evidence doctrine of Rule of Civil Procedure 52 (a) and failing to consider parts which made the findings of the trial court untenable.

a. Physical impossibility that Betty Conner, as the first wife of Siah, was the mother of Jackson and Tecumseh.

Finding for the Three Groups, the trial court found Betty Conner to be the mother of the Jackson Barnett who died in 1934, and of his brother Tecumseh. An examination of enrollment records of the Conner family (Conner Exhibits 53, 17, 16, 15, 13) taken in conjunction with uncontradicted testimony of the Conner Group about Betty Conner (R. 13207-13220, R. 7818-7835) demonstrated Betty Conner was born after 1850, the year a brother older than she was born. Pension records of Tecumseh who fought in the Civil War establish Tecumseh was born about 1838. On the documentary records, the trial court's findings have Betty the mother of a son born a decade before she was. Jackson Barnett himself, on the record, was about as old as this purported mother.

Before the Circuit Court of Appeals, attorneys admitted there was a "discrepancy" but stated in a supplemental brief that either the documentary records are erroneous or one of their witnesses was in error. No explanation was offered as to the detailed supporting testimony by their other witnesses.

The Circuit Court passed no judgment on this vital internal conflict in the case of the Three Groups.

b. The determination of the Department of the Interior of the heirs of Siah Barnett in 1903 is a final adjudication that Jackson was not his son. In 1903 when the evidence of family relationships was much more readily ascertainable the Department of the Interior made a *quasi*-judicial finding of the heirs of Siah Barnett—Jackson was not among them. The occasion was the payment of awards to the Loyal Creeks of the Civil War or their heirs. Inasmuch as Siah was dead the duty devolved upon the Department of the Interior to determine the rightful heirs.

The Circuit Court stated (122 F. (2d) 782) "the award merely described the property loss and fixed the amount to be awarded" and that the determination of the heirs was not conclusive. However, the court overlooked the direction in the Act of Congress approved March 3, 1903, 32 Stat. L. 982, that awards be paid to heirs of deceased Loyal Creek Indians such as Siah. Reports of the Commissioner of Indian Affairs, June 30, 1904, and June 30, 1905. Such a decision called for by the Congress in regard to Indian Affairs is final, conclusive and binding. *Norton* v. *Larney,* 266 U. S. 511; *Kimberlin* v. *Commission,* 104 Fed. 653, 44 C. C. A. 109; *Hegler* v. *Faulkner,* 153 U. S. 109.

Conclusion.

The questions involved are of vital importance and call for an authoritative ruling by this Court. The constitutional issues involved are of as much importance to the public at large as they are to the litigants. The decision of the court below is in conflict with a decision of this Court. It involves the affairs of Indians, wards of the Federal Government, whose rights are always jealously guarded by this Court. For the reason stated, therefore, it is respectfully submitted that this petition for a writ of *certiorari* should be granted.

NORMAN L. MEYERS,
JAMES D. SIMMS,
Attorneys for Petitioners, Joe Tiger, et al.;
PAUL PINSON,
Attorney for Lucy Curns and Ellis Gentry.

(3)

Office - Supreme Court, U. S.
FILED
JAN 28 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

In the Matter of the Estate of Jackson Barnett, Deceased:

ROSA ALLEN et al.

vs.

ANNIE BEAMS et al.

No. 906

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals, for the Tenth Circuit,

and

BRIEF IN SUPPORT THEREOF.

J. A. FOWLER,
Counsel for Petitioners.

H. G. FOWLER,
S. F. FOWLER,
WM. C. WILSON,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

Petition for Writ of Certiorari..... 1–8

I. Summary statement of the matters involved..... 1

II. Jurisdiction 5

III. Specification of errors 5

IV. Reasons relied on for the allowance of the writ... 6

Brief and Argument in Support of Petition.....9–44

I. Brief 9

II. Argument 10

A. The petitioners, by clear, cogent and convincing testimony, established that they are the nearest of kin of Jackson Barnett, deceased..... 10

B. The evidence conclusively shows that neither of the three prevailing groups are heirs of the decedent Jackson Barnett 18

C. The contract between the three prevailing groups was void and requires a reversal of this case 28

Terms of the agreement..... 30

Analysis of opinion of Court of Appeals.... 36

Authorities Cited.

Black's Law Dictionary 9, 40

Burns v. Burns, 137 Fed. 781.....9, 41

11 C. J., page 253, Section 43b.....9, 30

14 C. J. S., page 369, Section 27.....9, 30

Forsyth v. Hammond, 166 U. S. 506..... 5

Gay v. Ruff, 292 U. S. 25, 78 L. Ed. 1099..... 5

Words and Phrases 41

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

In the Matter of the Estate of Jackson Barnett, Deceased: ROSA ALLEN et al. vs. ANNIE BEAMS et al.	No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Tenth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Jackson Barnett, a restricted Creek Indian, died in Los Angeles, California, on May 29, 1934, seized of valuable real estate and a large amount of personal property in the

hands of the Secretary of the Interior, all being restricted property. On May 31, 1934, two days later, a proceeding for the appointment of an administrator of his estate was filed in the County Court of Muskogee County, Oklahoma (Clk. Tr. p. 35 et seq.).[1] Thereafter two separate suits were filed, one in the District Court of Muskogee County (Clk. Tr. p. 107 et seq.) and the other in the District Court of McIntosh County (Clk. Tr. p. 132 et seq.), raising questions as to the ownership of certain property of the decedent. The United States caused all three of these proceedings to be removed to the United States District Court for the Eastern District of Oklahoma, but that part of the first case which related to the appointment of an administrator was remanded to the State Court, and that part which concerned the determination of heirship was retained. The three cases were then consolidated for hearing. Approximately fifty groups of more than 600 persons filed intervening petitions setting up various claims of heirship to the decedent. (See Opinion of Ct. of App., 122 Fed. [2nd] 777, 780; Tr. C. C. A. p. 12.) These petitioners intervened in said cause in the United States District Court on June 18, 1936. At that time the cause had proceeded to such an extent that approximately 6,000 pages of testimony had been taken on behalf of various claimants (Clk. Tr. p. 498). As of June 30, 1936, three groups of claimants, who had theretofore contested bitterly among themselves, entered into a so-called family contract or settlement, whereby it was agreed that these three groups of claimants were all related to the deceased; that they would

---

1 The transcript of the record in this cause was not printed in the Circuit Court of Appeals and was very voluminous. The record of the pleadings, orders and other matters in the technical record are in separate volumes and designated Clerk's Transcript. References to such matters in this petition and the accompanying brief are made: "Clk. Tr. p. .." The record of the evidence is in other volumes with different page numbering, and references to evidence in this petition and in the brief are made: "Tr. Ev. Vol. .., p. .." References to the transcript from the Circuit Court of Appeals, certified copy of which is filed with this petition, are made: "Tr. C. C. A. p. .."

pool their resources and efforts in opposing the claims of all other persons or groups of persons against the estate of the decedent; that each group would continue to bear the expense of establishing its own claim of heirship; that neither of the groups would oppose either of the other two groups in the proof of its claim to heirship, but, on the other hand, that each group would co-operate with the other groups in establishing their claims. The respective claims of relationship to Jackson Barnett of the three groups, and the evidence relating thereto, will be stated in the supporting brief and argument.

These groups are known and designated in the record as follows: Group #I, known as the Siah Barnett Group; Group #II, known as the Conner Group, and Group #III, known as the Stepney-Gouge Group. The so-called family contract provided that if either of these groups should be adjudged the nearest of kin to Jackson Barnett, the Court should enter a decree awarding one-half of the estate to the Siah Barnett Group, and one-fourth of the estate each to the Conner and Stepney-Gouge Groups. (See copy of contract, Exhibit A to intervening petition of Lucy Curns, Clk. Tr. p. 480.)

Petitioners Rosa Allen et al. asserted that Jackson Barnett was the only son of James Barnett and Margaret A. Condry, who were married in Claiborne County, Tennessee, on April 25, 1841. The marriage license of James Barnett and Margaret A. Condry was duly proven (Exhibit 7A to E. H. McDaniel, Tr. Ev. Vol. 7, p. 3035). It was proven that about the time of the outbreak of the Civil War James Barnett, his wife having died, took his only son Jackson to Missouri, where his brother Anderson resided. It was also proven by statements of Jackson Barnett made in Oklahoma that he had formerly lived in Missouri, but that he had come originally from Claiborne County, Ten-

nessee (Tr. Ev. Vol. 7, pp. 3066-88). It was proven that relatives in Tennessee had heard from Jackson Barnett by letter, and that upon one occasion he had sent goods to make a dress to one of his relatives in Tennessee (Tr. Ev. Vol. 7, pp. 3039-3046). It was further proven that Jackson Barnett filed an application for a passport in the year 1929, in which he stated that he was born in 1842 and that his father had died in the year 1860 (Exhibit No. 4 introduced by Siah Barnett Group), which corresponds exactly to the claimed facts of petitioners.

Petitioners also relied upon the fact that while the Court found that Jackson Barnett had been mentally incompetent since his birth and was known as a "crazy Indian," yet he spoke English well, which accomplishment he would not have acquired if he had been born and reared among the Creek Indians of Oklahoma (Tr. Ev. Vol. 1, pp. 462, 483). He also read English (Tr. Ev. Vol. 1, p. 481).

Petitioners further asserted the significance of the fact that there was no evidence in the record of anyone who had seen Jackson Barnett in Oklahoma prior to his early manhood, when he was recognized as a lost, roving Indian. The evidence supporting petitioners' claim of relationship to the deceased will be fully cited in the supporting brief and argument.

The District Court entered a final decree on January 2, 1940, holding that the Siah Barnett Group were the nearest of kin to the decedent Jackson Barnett, and pursuant to the contract above mentioned awarded one-half the estate to that group and one-fourth of the estate each to the Conner and Stepney-Gouge Groups (Clk. Tr. p. 1197 et seq.).

Petitioners and eight other groups of claimants to the

estate appealed from the decision of the District Court to the United States Circuit Court of Appeals for the Tenth Circuit. On September 2, 1941, the Circuit Court of Appeals rendered an opinion affirming the action of the District Court, and on the same date judgment was entered in accordance therewith (Tr. C. C. A. p. 13).

II.

JURISDICTION.

1. The date of the judgment or decree to be reviewed is September 2, 1941. By order entered in this Court on December 1, 1941, petitioners were allowed until January 31, 1942, within which to file this petition.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 347 of Title 28 of the U. S. Code (Acts of March 3, 1891, ch. 517, sec. 6, 26 Stat. 828; March 3, 1911, ch. 231, sec. 240, 36 Stat. 1157; February 13, 1925, ch. 229, sec. 1, 43 Stat. 938; January 31, 1928, ch. 14, sec. 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926). The cases believed to sustain said jurisdiction are as follows: **Gay v. Ruff**, 292 U. S. 25, 78 L. Ed. 1099; **Forsyth v. Hammond**, 166 U. S. 506.

III.

SPECIFICATION OF ERRORS.

1. The United States Circuit Court of Appeals, for the Tenth Circuit, erred in holding that respondents were the nearest of kin of the decedent, Jackson Barnett, and entitled to his estate.

2. The United States Circuit Court of Appeals, for the Tenth Circuit, erred in failing to find that petitioners were the nearest of kin of the decedent, Jackson Barnett, and therefore entitled to his estate.

3. The United States Circuit Court of Appeals, for the Tenth Circuit, erred in holding that the so-called family contract was valid and not void as champertous and as against public policy; and in refusing to reverse the action of the lower Court because of the unwarranted and prejudicial acts of the Assistant United States Attorney for the Eastern District of Oklahoma.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the said Circuit Court of Appeals so far departs from the accepted and usual course of judicial proceedings, and so far sanctions such a departure by the lower Court, as to call for an exercise of this Court's power of supervision in the following particulars:

(a) The lower Court permitted three groups of claimants to enter into a contract by which it was agreed that if either one of them were successful all of them would participate in the estate in the proportion recited in the contract. Each of these groups had theretofore vigorously contested the claim of each of the others. If the members of either group were the heirs, members of the other two groups would get nothing. The contract provided that neither group would contest the claim of either of the other two groups. The natural tendency of the parties as a result of this contract was to suppress evidence. Such was the actual result, as at least one important witness

changed her testimony entirely after the contract was entered into. It was error for the District Court and for the Circuit Court of Appeals to hold such contract valid.

(b) Since decedent was a restricted Indian, the United States Government had an interest in this case as a stakeholder, and intervened in the first instance in that capacity. Later the Assistant District Attorney, who appeared in the case for the Government, departed from his duties as representing an interpleader and actively aided the three groups, parties to the contract above mentioned. He helped prepare and have the contract executed, actively participated in the preparation and trial of the case on behalf of those who were parties to such contract, and in every way possible threw the weight of the United States Government behind the three contracting groups and against petitioners and other claimants.

2. The decision of the said Circuit Court of Appeals holding that the so-called family contract entered into between the three prevailing groups of claimants was valid, and not void as against public policy, is an erroneous decision of an important question of general law.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals, for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals, for the Tenth Circuit, had in the case numbered and entitled on its docket, No. 2175, **Rosa Allen et all., Appellants, v. Annie Beams et al., Appellees,** to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals, for the Tenth Cir-

cuit, be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated January 26, 1942.

SHADE BARNETT,
MATTIE JACKSON,
LIZA MANNING,
TILMON MYERS,
MRS. CRESCIE HATCHER,
J. B. MILLS,
KATE BARNARD,
CECIL MCCOY SHOCKLEY,
A. M. YOUNG,
WILL YOUNG,
WYLIE WARD,
W. T. KING,
TENNESSEE KING,
LAURA WARD,
DANA HURST,
MARSHALL YOUNG,
G. W. DAVIS,
J. N. SMITH,
CALLIE SMITH,
NEAL LANE,
CORDIE MANNING,
ROBERT BROGAN,
JOHN M. (BAT) RABY,
MRS. ELIZABETH BALLARD,
LORETTA MCCORMICK,
SUSAN BARNETT,
MARY JARNAGIN,
OFFIE BROOKS,
HOBART BARNETT,
HENRY BARNETT,
ALLIE LAKINS,
WILL LAKINS,
HENRY LAKINS,
GEORGE LAKINS,
ANDY WEST,
NANCY WEST,
JANE WEST,
PEARLIE PEARSON,

By J. A. Fowler
Counsel for Petitioners.

H. G. FOWLER,
S. F. FOWLER,
WM. C. WILSON,
Of Counsel.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

BRIEF.

A. The petitioners by clear, cogent and convincing testimony, proved the marriage of Jackson Barnett's parents and traced his life from his birth to his death. No witness on behalf of any other claimant saw, knew or heard of Jackson Barnett until after he was a grown man. A consideration of all the evidence compels the conclusion that petitioners are the nearest of kin of Jackson Barnett, deceased.

B. The evidence on behalf of the three prevailing groups of claimants is so contradictory and unconvincing as to be entirely insufficient to support a judgment in their behalf. The documentary evidence, as well as oral testimony, conclusively shows that the persons constituting neither of these three groups are heirs of the decedent, Jackson Barnett.

C. The contract between the three prevailing groups was against public policy and was also champertous. Furthermore, its approval by the Secretary of the Interior was procured by misrepresentation. Therefore, said contract was void; and its admission by the Court and its treatment as valid from the time of its filing wrought an injustice upon these petitioners, and many other claimants, and constitutes a reversible error, for which the cause should be remanded to the District Court for a trial de novo.

11 C. J., p. 253, Sec. 43b;
14 C. J. S., p. 369, Sec. 27;
Black's Law Dictionary;
Burns v. Burns, 137 Fed. 781.

II.

ARGUMENT.

A.

The Petitioners by Clear, Cogent and Convincing Testimony, Proved the Marriage of Jackson Barnett's Parents and Traced His Life From His Birth to His Death. No Witness on Behalf of Any Other Claimant Saw, Knew or Heard of Jackson Barnett Until After He Was a Grown Man. A Consideration of All the Evidence Compels the Conclusion That Petitioners Are the Nearest of Kin of Jackson Barnett, Deceased.

The testimony offered in support of the claim of Rosa Allen et al., begins with the marriage of the parents of Jackson Barnett in Claiborne County, Tennessee, which is on the Kentucky line, and traces him to Missouri, where he went as a boy with his father, and identifies him in Oklahoma. There was no attempt to contradict this testimony. The principal witnesses were reputable and entirely disinterested. They each referred to names, events and places by which they could have easily been discredited had they not testified truthfully.

It is proven that an Indian by the name of Jackson Barnett was born on Big Sycamore Creek, in Claiborne County, Tennessee, the only child of James Barnett and Margaret A. Condry, who were married in Claiborne County, Tennessee, in April, 1841. Their marriage is proven by a marriage license duly returned by a minister which is a part of the record in this cause, it being filed as Exhibit 7A to the deposition of E. H. McDaniel. So these claimants rest their case upon an actual proven marriage, which is quite in contrast to the vague and hazy relationship existing among those who are alleged to be the parents of Jackson Barnett by the other claimants.

In this marriage license the name was spelled "Barnard" instead of "Barnett," but numerous witnesses were introduced, particularly kinspeople, who testified that the name was sometimes spelled one way and sometimes another, which testimony was supported by documentary proof, such as a grant issued by the State of Tennessee to George Barnett, brother of James Barnett, in which the name was spelled both ways, and another grant of the State of Tennessee to Johnathan, brother of James Barnett. In these two documents, and others filed, the names were spelled "Barnett," "Barnard" and "Barnette" (Tr. Ev. Vol. 7, pp. 3035-3038).

Witnesses were introduced who actually knew James Barnett and his wife, Margaret A. Condry; knew the families to which they belonged; knew that they were Indians, and knew that James Barnett had a son Jackson Barnett, and knew, too, that about the time of the Civil War, his wife having died, James Barnett took his son Jackson and went to Missouri, and that neither of them ever came back to Tennessee. According to family history, Jim Barnett started with his son Jackson to Pleasant Hill, Missouri, where Jim Barnett's brother, Anderson, lived (Rec. p. 2980). According to family history Jim Barnett was killed before he got to their intended destination (Rec. p. 2980). Clint Barnett, now dead, went out to Missouri, and was heard to say that he had seen Jackson out there and tried to get him to come back (pp. 2981-2982).

The testimony relied upon by petitioners to prove that this particular Jackson Barnett of Oklahoma was the Jackson Barnett whose estate was in dispute in this case, was as follows:

The witness Nancy Seals testified that Clint Barnett had a letter from Jackson Barnett, who was at that time in the Indian territory. The witness saw the letter, did not

read it, but was told what was in it (Tr. Ev. Vol. 6, p. 2983).

The witness Nancy Davis, 66 years of age, who resided in Morristown, Tennessee, stated that her mother was a daughter of Anderson Barnett, brother of James Barnett. Her mother had been dead for about nine years. She had heard her mother talk about Jackson Barnett; that Jackson Barnett sent her mother the goods to make a dress when the witness was about 11 or 12 years old. Her mother had the dress made and wore it until it was worn out and saved the remnants, which were used in making a part of a quilt. One of the squares of this quilt was ripped out in the presence of counsel and filed as Exhibit 8A to deposition of witness. A photostatic copy of this material is filed and is a part of the record in this cause. The witness remembers her father bringing this cloth from the post office, and says that a letter from Jackson Barnett accompanied it (Tr. Ev. Vol. 7, pp. 3041, 3042, 3043, 3044, 3045).

This testimony was corroborated by that of Rosa Allen, sister of Nancy Davis (3047-3045), and also by the witness Henry Faddis, who worked for the father of Nancy Davis at the time in the operation of a registered government distillery.

In identifying the Jackson Barnett whose estate is involved in this cause as being the same as the person of that name who was born in Claiborne County, Tennessee, petitioners relied primarily upon the testimony of Alva Nevels, a man 52 years of age, who was a reputable farmer of Claiborne County, Tennessee. This witness owned his own farm which contained 82 acres. He was a married man, the father of seven children, one son a lawyer, one a doctor and another boy in college (Tr. Ev. Vol. 7, p. 3061). This witness also has a brother who was tax assessor of Claiborne County, Tennessee, and a brother who was a retired Army physician (page 3087).

This witness had no interest whatever in this case, as he did not claim to be of kin to Jackson Barnett. He says he went to Douglas County, Missouri, from Claiborne County on March 9, 1913; that he rented a farm from a man by the name of Henry Hartwell; that his crop was an absolute failure; that he sent his family back to Tennessee along in September and that he and three others by the name of Louis Wiser, Johnny Wiser and Charley Cain, the latter being now at Fort Charles, Virginia, went to Muskogee, Oklahoma, looking for work. While there they stayed with a sister of Louis Wiser and Johnny Wiser, whose name was Starks. He states that while he was there looking around town for work he met Jackson Barnett and talked with him several times as they loafed around. He says that Jackson Barnett told him that he was borne in Claiborne County, Tennessee, near Tazewell, which is the county seat; that Jackson Barnett asked him if he knew the names of people in Claiborne County by the name of Barnett; and that he told Jackson Barnett he knew the name of Jim Barnett, and Jackson said, "My father was named Jim Barnett." He said that Jackson Barnett told him, "I was raised in that county. I have got people back there by the name of Barnett"; that he told Jackson Barnett his name and that Jackson Barnett then stated that he knew a man by the name of Bishop Nevels, and that he told Jackson Barnett that Bishop Nevels was his half brother. The witness testified that Bishop Nevels was a preacher and died a very old man near Norwood, Missouri. It was because of his presence in Missouri that the witness had gone there. The witness stated that Jackson Barnett said he had lived in Thayer, Missouri, which is near the southern boundary. The witness testified that Jackson Barnett spoke English well (Tr. Ev. Vol. 7, p. 3076). The witness mentioned the names of Elbert Chadwell and Will Miller as other people he knew in Muskogee. The descrip-

tion which the witness gave of Jackson Barnett was apparently a likeness of the Jackson Barnett whose estate is involved in this case. There was no attempt to contradict this testimony.

Upon cross-examination the following questions and answers appear (Tr. Ev. Vol. 7, p. 3076):

> "Q. Did he (Jackson Barnett) refer to any of the occurrences in his young manhood and boyhood in Tennessee?
>
> A. He said that him and Bishop Nevels was at Clinch River once and saw two boys having a fight in the river, swimming, had their clothes off in the river swimming—two boys by the names of Barnetts, and Bishop was visiting his grandmother on Clinch River, he said, and I learned from Bishop that the people were there."

The only means by which it is sought to attack the credibility of this witness is by reason of his testimony upon cross-examination as follows:

> "Q. How large a town (referring to Muskogee)?
>
> A. A small town.
>
> Q. Four or five hundred?
>
> A. It was a small town about like Cumberland Gap, Tennessee.
>
> Q. How was it compared with this town here?
>
> A. It was a little better town than this town here. Not scattered as bad.
>
> Q. Do you think there was as many as seven or eight hundred people?
>
> A. I imagine there was.
>
> Q. How many stores were there?
>
> A. I wouldn't be able to tell you that. I didn't notice particularly."

At that time Muskogee, according to the census, was a city of about 25,000 population. Nevertheless, this is insufficient to discredit his testimony, particularly in the

absence of any interest on his part in the subject matter of this litigation and no reason being shown why he should have given special attention to the size of the town. Such a slight discrepancy in the testimony of the witness becomes insignificant when compared with the contradiction and confusion existing in the testimony introduced by the appellees.

A witness, who was entirely disinterested, by the name of Nancy Saylors, was introduced on behalf of other petitioners (Tr. Ev. Vol. 15, pp. 7076-7105). She was 64 years of age and a resident of Kentucky. She testified to a conversation between her husband and Jack Barnett in her home in Los Angeles about fifteen years ago. It appears from her testimony that her husband was dead and that she had moved back to Kentucky, and seeing an account of the death of Jackson Barnett in the Lexington Leader she was reminded of the conversation. She says, in substance, that her husband was seventeen years her senior (and was accordingly born about 1856), and that he attended school for eighteen months in Tennessee, which school is easily identified as Lincoln Memorial College, or its predecessor, which is in Claiborne County, the place where these petitioners insist that Jackson Barnett was born. While there her husband stayed at the home of Joe Henry Barnett.

In the year 1921 or 1922 the witness and her husband moved to Los Angeles. It was some time thereafter the witness, not attempting to give the date, though she thought it was "about 1922," that this conversation took place. They lived in Los Angeles for about ten years. Jackson Barnett moved to Los Angeles in May, 1923 (Tr. Ev. Vol. 1, p. 456).

Apparently one of the sons of the witness, while about his daily duties as an operator of a street car, became ac-

quainted with Jackson Barnett and in this way an acquaintance was formed between her husband and Barnett, who upon one occasion came to their home and ate the noonday meal with them. In the conversation concerning which the witness testifies, names and places were discussed in which Jackson Barnett was interested, indicating his former residence in Tennessee (Tr. Ev. Vol. 15, p. 7080).

The Siah Barnett Group filed an application for a passport made by Jackson Barnett in 1929 (Exhibit 4). Jackson Barnett stated in this application that he was born in the year 1842. This is strong corroboration of the fact that this is the Jackson Barnett who was born in Claiborne County, as the marriage license of his parents had been introduced, and it is proven that they were married in the year 1841. It was proven that Jackson was the only child, and here we have his own sworn statement that he was born in 1842. This is the strongest gleam of light which shines through the cloud of confusion produced by this record. It is also stated in this application that his father died in 1860, which is in exact accord with the tradition of the Barnett family of Tennessee (and the testimony of Peter Harvey, 87 years old in 1937, who says he knew James Barnett and son Jackson in Tennessee) and is in direct conflict with the idea that Siah Barnett was his father, because Siah Barnett died in the year 1897.

It is the further insistence of these claimants that the following facts corroborate their theory that Jackson Barnett was born in Tennessee, and that they, as his relatives, are entitled to his property.

In the first place, Jackson Barnett, according to all of the testimony, spoke English well. If he had been born and reared among the Indians of Oklahoma he probably wouldn't have talked English. This is particularly true, as the proof shows that he was not a man of strong men-

tality. The District Court found that Jackson "from his youth up had been an incompetent; that he was weak-minded and generally known as Crazy Jack" (Clk. Tr. p. 737). He learned to talk Creek as a matter of necessity, but there was no need of his learning to talk English.

That he talked English well is not contradicted. His wife, Annie Laura, with whom he lived for fourteen years, testified upon this point as follows:

"Q. Did he speak English?

A. He spoke well. He talked accurate English from the time I knew him. He wouldn't speak anything else after he was married. We never could get him to say a word in Creek (Tr. Ev. Vol. 1, p. 462).

Q. Jackson could not read nor write, could he?

A. Yes, a little bit. He read the headlines of the paper. He was always scribbling, always buying crayons, paper and pencils. I think he would have been an artist had he had an opportunity (Tr. Ev. Vol. 1, pp. 481, 482).

Q. Could he talk as good English as I can?

A. He spoke good English.

Q. That was in 1897?

A. Yes. He spoke good English.

Q. Then he could talk good English all his life?

A. Yes, and he did. After we were married he wouldn't speak anything but English" (Tr. Ev. Vol. 1, p. 483).

This same witness testifies:

"Q. Did Jackson during all the time you lived with him mention the fact that he had a sister by that name?

A. No. He always said he didn't have any relatives. When we first went to Henryetta to reside a number of those people came up and said they were related. Sometimes they were men and sometimes they were women, but he always turned his back on them and walked away and said he didn't have any relatives."

This is the attitude of one who was born elsewhere. If

he had been born and reared in Oklahoma with the hundreds of people there who now claim to be his relatives he would not likely have said that he did not have any relatives.

We find no instance in this record of anyone testifying either of their own knowledge or from what others told them that Jackson Barnett was ever seen in Oklahoma when he was a child. Apparently he was a young man before he was known there and at that time he was a roving, lost Indian, apparently living with such people who would take him in. He first appears upon the rolls in 1882.

While naturally the mode of living of the Indians makes it somewhat difficult to trace parentage, yet we believe it should be apparent to the Court that if Jackson Barnett was born, and lived from the time of his birth until the date of his death in Oklahoma, that his parentage could be traced with more certainty and with greater clearness than was done by the appellees. Particularly is this true when apparently some of the appellees (The Conner Group) had been engaged in the preparation of their case in Jackson Barnett's lifetime, as the proceeding instituted by them was filed in Oklahoma two days after Jackson Barnett died in California (Clk. Tr. Vol. 1, p. 35).

B.

The Evidence on Behalf of the Three Prevailing Groups of Claimants Is So Contradictory and Unconvincing as to Be Entirely Insufficient to Support Judgment in Their Behalf. The Documentary Evidence, as Well as Oral Testimony, Conclusively Shows That Neither of These Three Groups Are Heirs of the Decedent, Jackson Barnett.

The District Court and the Circuit Court of Appeals held that the persons constituting the Siah Barnett Group

designated as Group #I were the nearest of kin to the decedent on the paternal side; that the persons constituting the Conner Group of claimants designated as Group #II and the persons constituting the Stepney-Gouge Group of claimants designated as Group #III were the nearest of kin to the decedent on the maternal side.

The basis for the claim of the Siah Barnett Group is that Siah Barnett was the father of Jackson Barnett, and that his mother was Thesothle or Betty; that Thesothle died during or before the Civil War, and that Siah Barnett married a second time, his second wife being named Mary. By this second marriage Siah Barnett had five children: David, Eliza, Ellen, Hannah and Sissie. The persons constituting the Siah Barnett Group are the descendants of the children of Siah and Mary Barnett.

Group #II, or the Conner Group, claim that Thesothle or Betty was the mother of Jackson Barnett and that he was her only child, his father being unknown. They claim that Tusekiah Micco, known as old man Conner, was the father of Thesothle; that old man Conner had several other children, the brothers and sisters of Thesothle, and the members of this group are the descendants of the brothers and sisters of Thesothle or Betty.

Group #III, or the Stepney-Gouge Group, claim that Thesothle, also known as Betty, was the mother of Jackson Barnett, that his father was unknown. That Thesothle had three other sons, to wit, Haryarechee, otherwise known as Jim Lowe, Tecumseh and Joe; that Joe and Tecumseh died without issue, and that the members of this Group are the descendants of Haryarechee or Jim Lowe.

The Weakness of the Claim of the Siah Barnett Group.

All of the witnesses agree that Jackson Barnett was a full blood Indian, or part Indian and part white, and that

he had no negro blood. Practically all of the witnesses also testify that Siah Barnett was either a negro or at least one-half negro (Tr. Ev. Vol. 6, pp. 2723-2725; Tr. Ev. Vol. 6, pp. 2813-2834, 3787).

On December 8, 1869, Siah Barnett, on his own behalf, filed a claim with the United States Government for payment for property claimed to have been lost by reason of the claimant being loyal to the United States and abandoning his property during the Civil War (Curns Ex. #17, Clk. Tr. Vol. 1, pp. 415-417). This claim was made before Captain F. A. Field of the United States Army, Creek Agent. In the face of the claim Captain Field described Siah Barnett as "a half Creek, probably Creek and negro refugee." The claim shows that Siah Barnett was examined in English without the aid of an interpreter, and the supporting witnesses offered by him on the claim were Paro Bruner and William Bruner, **Freedmen.** This claim as thus prepared was signed and sworn to by Siah Barnett. On December 8, 1869, Siah Barnett also appeared as a supporting witness to the claims of two other persons for lost property. One of these was the claim of Timothy Barnett, Creek, as Administrator of the estate of Aleck Kernell (Curns Ex. 24). Siah Barnett, in making his supporting affidavit to this claim, described himself as **Freedman.** The other claim was that of Sukey Barnett, a Creek refugee, and the supporting affidavit of Siah Barnett describes him as "freedman, who testified in English" (Curns Ex. 23). So it appears that on this same day, December 8, 1869, Siah Barnett appeared before the Creek Agent, Captain F. A. Field, of the United States Army, three times in connection with claims for lost property. In his own claim he is described as half Creek, probably Creek and negro, but when he appears as a supporting witness to the claims of others he does not bother to show that he has any Creek blood at all, but merely describes himself as **"Freedman."**

In addition to these statements made by Siah Barnett himself as to his race the vast majority of the witnesses who testified on the question stated that Siah Barnett was, or appeared to be, part negro (Tr. Ev. Vol. 6, pp. 2738, 2833, 2887, 2930, 2940; Vol. 8, pp. 3787, 3800; Vol. 9, pp. 4063, 4211; Vol. 11, pp. 5188, 5286, 5294).

The census card of Trump Barnett, enrolled as a negro Freedman, recites that his father was Siah Barnett, who was identified as a slave of William Sullivan. Probably the only witness living at the time of the trial with personal knowledge of Siah Barnett, the ancestor of this group of claimants, was John Roberts, commonly referred to as John Cat. This witness testified that this Siah Barnett was the slave of William Sullivan, and that he knew him prior to the Civil War, living near Buzzard Hill (Tr. Ev. p. 1329).

It is clear that Siah Barnett, a negro, or at least half negro, could not have been the father of Jackson Barnett, a full blood Indian, or part Indian and part white, with no negro blood.

But even admitting for the purpose of argument that Siah Barnett was the father of Jackson Barnett, yet the persons constituting the Siah Barnett Group cannot inherit the estate of Jackson Barnett. Siah Barnett was by his own admission a **Freedman**. In other words, before 1866, he was a slave and could not enter into the marriage relation. Therefore, he could not have been married to Thesothle, the alleged mother of Jackson Barnett, and no heritable blood could exist between Jackson Barnett and Siah Barnett, or between Jackson Barnett and the heirs of Siah Barnett, as it is undisputed that Jackson Barnett was born between 1840 and 1852.

The documentary evidence does not support the claim that Siah Barnett was the father of Jackson Barnett. It

is undisputed in the proof that Siah Barnett, the ancestor of the persons constituting Group #I, died in 1897 (Tr. Vol. 6, p. 2767). Jackson Barnett filed an application for a passport on October 28, 1929 (William Fisher's Ex. No. 4, Tr. Ev. Vol. 6, p. 2755), in which he states that his father died in 1860.

The best documentary proof of relationship in Indian tribes is the tribal rolls prepared by the tribes themselves. Rolls were made of the Creek tribe for the years 1857, 1859, 1867, 1882, 1890 and 1895. The only Siah Barnett listed on the 1857 roll is the following family group: "No. 105, Siah Barnett, Eliza, Letty, James, Winey, Dave, Joshua, Thomas, Maria" (Curn's Ex. #7). Although a roll was made in the year 1859 no person is shown thereon by the name of Siah Barnett.

On the 1867 roll the nearest to Siah Barnett is the following family group: "No. 101, Cilas Barnett, Mary Barnett, David Barnett, Morriah Barnett, Ellen Barnett, Hannah Barnett, Katy" (Curn's Ex. #10).

The next or 1882 roll contains the following family group: "Tarya Barnett, Mary Barnett, David Barnett, Liza Barnett" (Curn's Ex. #12).

The 1890 roll contains the following family group: "Siah Barnett, Mary Barnett, David Barnett, Maysopha Barnett" (Curn's Ex. #14), and the 1895 roll contains the following family group: "Siah Barnett, Mary Barnett, David Barnett, Benjamin Davis, Pompey Davis" (Curn's Ex. #15).

No oral testimony was introduced to connect the Siah Barnett on the 1857 roll, or any member of the family thereon listed, with the Siah Barnett, ancestor of that group of claimants, and who died in 1897. The fact that no Siah Barnett appears upon the 1859 roll would indicate

that the 1857 Siah Barnett died between the making of the 1857 and the 1859 rolls. Several of the older witnesses also testified that there were two Siah Barnetts. Sarty Crowe, 84 years of age at the time he testified, stated that he knew Siah Barnett and Jim Barnett, who were sons of Tom Barnett, and testified as follows:

"Q. Did you know of any other Siah Barnett?
A. I know of a late Siah Barnett, and an old Siah Barnett.
Q. Which one was the late Siah Barnett; where did he live?
A. Around Bryant.
Q. Was he a brother of Jim?
A. Yes.
Q. Where did the old Siah Barnett live?
A. About six miles north of what is now Indianola.
Q. When did he die?
A. I don't know, but pretty close to Civil War.
Q. Before or after the Civil War?
A. Just before" (Tr. Ev. Vol. 11, p. 5050).

Another witness, Johnson Reed, who was 88 years old at the time he testified, knew Jim and Siah Barnett, the sons of Tom Barnett, and states that he also knew of another Siah Barnett, who died before the Civil War (Tr. Ev. Vol. 11, pp. 5102-5103).

The Siah Barnett Group seek to adopt the Cilas Barnett found on the 1867 roll, and the Tarya Barnett found on the 1882 roll, as being their ancestor, Siah Barnett, by another name. We are unable, however, to see any reason for this discrepancy in names, and no oral testimony has been introduced in so far as we are able to ascertain which explains this difference. On the other hand the testimony of William Fisher, a grandson of Siah Barnett, and one of the respondents herein, directly contradicts any such theory. At page 3735 of the transcript he testified:

"Q. How many names did Siah Barnett have, your grandfather?

A. Just one.

Q. Did you ever know him to be called Cilas Barnett?

A. No, sir."

And again at page 3737:

"Q. You say you never heard him called Cilas Barnett?

A. No, sir.

Q. Or Toryer (Tarya)?

A. No, sir."

The witness Annie Beams, a granddaughter of Siah Barnett, and one of the respondents herein, testified as follows:

"Q. Did Siah Barnett have any other name than Siah?

A. No, sir; that is all the name.

Q. That is the only name you ever knew him by?

A. Yes, sir.

Q. He was never known as Cilas Barnett?

A. No, sir.

Q. Toryer (Tarya) Barnett?

A. No, sir" (Tr. Ev. Vol. 8, p. 3714).

So the first time that Siah Barnett, ancestor of respondents, or his family group appears upon the rolls of the Creek Nation was in 1890. This is consistent with the idea that Siah Barnett before the Civil War was a slave, at least one-half negro; could not have been the father of Jackson Barnett, and, even if he were, could not have been the legitimate father so as to inherit from decedent. It has been noted, too, that Jackson Barnett does not appear upon any roll with Siah Barnett or his family group.

Culminating all this documentary and oral testimony is the action of the family of Siah and Mary Barnett in disclaiming any relation to Jackson Barnett when action was

taken upon the loyal Creek claim filed by Siah Barnett. As heretofore stated, this claim was filed on December 8, 1869, by Siah Barnett, who was then living. It was filed pursuant to Article 4 of the Treaty of June 14, 1866, with the Creek Indians, providing as follows:

> "A census of the Creeks shall be taken by the Agent of the United States for said Nation under the direction of the Secretary of the Interior and a roll of the names of all soldiers that enlisted in the Federal Army, Loyal Refugees, Indians and Freedman be made by him. The Superintendent of Indian Affairs for the southern Superintendency and the Agent of the United States for the Creek Nation shall proceed to investigate and determine from the said roll the amounts due the respective refugee Indians and shall transmit to the Commissioner of Indian Affairs for his approval, and that of the Secretary of the Interior, their awards, together with the reasons therefor."

An award was made upon this claim in the amount of $460. No funds were available for payment of the claim until an appropriation was made by Congress by Act approved March 1, 1901. By this time Siah Barnett had died and payment of the claim was made to the widow and heirs of Siah Barnett. Mary Barnett, the widow of Siah Barnett, made oath that she was his surviving widow, that he died in 1897 and left the following heirs: Mary Barnett, affiant, Dave Barnett, Pompey West, Jim Fisher, Sevin Fisher, William Fisher, Maria Fisher, Louis Fisher, Willie McQueen, Charity Grayson, George Walker and Joe Bird (Clk. Tr. pp. 415, 417). So Mary Barnett, the widow of Siah Barnett, swore that Jackson Barnett was not a son of Siah Barnett, and the heirs of Siah Barnett, by accepting the benefits of said award to the exclusion of Jackson Barnett, are estopped now to claim any benefits from the estate of Jackson Barnett.

THE WEAKNESS OF THE CLAIM OF THE CONNER GROUP.

This group of claimants, as heretofore stated, insist that Thesothle or Betty was the mother of Jackson Barnett; that she died during the Civil War, single and unmarried, and that the identity of the father of Jackson Barnett is unknown; that Thesothle was the daughter of Tusekiah Micco, otherwise known as Neddy and as old man Conner, who died leaving the following children: William Conner, Hannah Williams, Thomas Conner and Thesothle. These claimants are the descendants of William Conner, Hannah Williams and Thomas Conner (Clerk's Tr. p. 210 et seq.). It is to be remembered that all of the proof indicates, and the Court has found, that Jackson Barnett was born between 1840 and 1850. Jackson Barnett himself stated in his application for a passport that he was born in 1842. The testimony on behalf of the Conner Group shows clearly that Betty or Thesothle was the youngest child in the Conner family. (See the testimony of Rebecca J. Baker, Rec. pp. 10027, 13220; Nathan Williams, Rec. p. 13206, and Winey Hendrix, Rec. p. 7818.) It is also clear from the census cards (Conner's Exs. 4, 16 and 17) that the Conner child next older than Betty was born not earlier than 1850. Therefore, it is clear that the Betty who was the daughter of old man Conner had to be born after 1850. She could not possibly then have been the mother of Jackson Barnett, who was born probably in 1842, and at the latest in 1852.

The record also discloses that there were several Indian women in the vicinity by the name of Thesothle, so that in addition to the physical impossibility of Thesothle, the daughter of old man Conner, being the mother of Jackson Barnett, the proof is otherwise most indefinite as to which Thesothle, if either, was the mother of Jackson Barnett. (See claims of Curns-Gentry Group and Tiger Group.)

The Weakness of the Claim of the Stepney-Gouge Group.

This group also claim that Thesothle or Betty was the mother of Jackson Barnett, but claims that Thesothle had three other sons, two of whom died without issue, and the third known as Haryarechee, otherwise known as Jim Lowe, is the ancestor of claimants. The same argument applies to this group as applies to the Conner Group, since they joined the Conner Group in asking the Court to find as a fact that the mother of Jackson Barnett was the daughter of Tusekiah Micco, or old man Conner (Clerk's Tr. p. 645).

According to Conner's Exhibit 50 and Curns' Exhibit 53, relied upon by that group, the family consisted of Thesothle, Tecumseh, Haryarechee and Jackson. This places Haryarechee in age between Tecumseh and Jackson, making him younger than Tecumseh and older than Jackson, and it was pointed out in argument on the Conner Group that Jackson is admittedly as old as Betty, who is claimed to be his mother, and Haryarechee being older than Jackson, would be older than his mother. Therefore, Haryarechee was not the son of Thesothle, the daughter of old man Conner, who it is claimed is the mother of Jackson Barnett.

C.

The Contract Between the Three Prevailing Groups Was Against Public Policy, and Also Champertous. Furthermore, Its Approval by the Secretary of the Interior Was Procured by Misrepresentation. Therefore, Said Contract Was Void; and Its Admission by the Court and Its Treatment as Valid From the Time of Its Filing Wrought an Injustice Upon These Petitioners and Many Other Claimants, and Constitutes a Reversible Error, for Which the Cause Should Be Remanded to the District Court for a Trial De Novo.

The claims of relationship of each of the three groups to the deceased Jackson Barnett have heretofore been stated.

The scope of the evidence necessary to establish the claims of each of these groups, and the effect of their establishment upon the claims of the other groups, should be carefully considered.

All three groups agree on one fact, that Thesothle was the mother of Jackson, and such motherhood must be proven to entitle a decree for either group.

The first group to succeed must also prove that Jackson Barnett was the legitimate son of Siah Barnett, which would require proof that Siah and Thesothle were legally married, or of such facts as would justify the presumption of their marriage; that they are descendants of Siah, and that Jackson died without issue.

The second group to succeed must prove that they are descendants of "Old Man Conner"; that Old Man Conner was the father of Thesothle; and that Jackson died without a widow or issue, and without either whole or half brothers or sisters, or descendants of such brothers or sis-

ters. Under the claims of these two groups manifestly the vital question between them is whether Jackson Barnett was the legitimate son of Siah. If he was, then as between them the first group took the estate to the total exclusion of the second, because the first inherited through the paternal brothers and sisters of the deceased, while the second group claims through the maternal uncles and aunts of the deceased. If Siah Barnett was not the husband of Thesothle, as between these two groups, the second group would take the estate to the exclusion of the first. Their claims are just as distinct as if the dispute was over the identity of the Jackson Barnett who owned the estate.

The third group to succeed as to the whole estate must prove that they are descendants of Haryarechee; that Haryarechee was Jackson's brother, and that Jackson died leaving no full or half brother or sister, or descendants of a brother or sister other than the descendants of Haryarechee. The establishment of such facts would destroy all claims of Groups I and II. If they should prove the relationship claimed and the first group should also prove the relationship claimed by them, this group would take as one of the total number of the brothers and sisters of Jackson who left descendants.

Now, suppose the second and third groups had entered into an agreement or conspiracy to co-operate in proving that Jackson was the illegitimate son of Thesothle, and that he had no sister and Haryarechee was the only brother leaving descendants, in consideration of which the estate would be equally divided between the two groups. Manifestly, such an agreement would have been void, first, because under the principle announced by the Court of Appeals it would have been against public policy, and, second, it would have been champertous. By no possibility could the second and third groups both have an interest in the estate. Proof that would require a decree

for the third group would necessarily entirely exclude the second group. The descendants of a brother would take all as against descendants of uncles and aunts. The condition would have been exactly the same as if the third group had filed its claim, and the second had agreed to finance and otherwise co-operate in its prosecution in consideration of an interest in the estate. Such an arrangement would have been void, though the contracting parties were relatives, because of the illegality of the consideration. 11 C. J., p. 253, Sec. 43b; 14 C. J. S., p. 369, Sec. 27.

Terms of the Agreement Considered in the Light of Claims of the Parties and Condition of the Record.

Now let this agreement, which in fact is a combination or conspiracy against all other claimants, be considered with reference to the group composed of Rosa Allen, George Barnett and others, the group in whose behalf this brief and argument is filed.

There is nothing in common between this group and either of the combined groups except that Jackson Barnett was the owner of the estate in question. The Rosa Allen Group claims that Jackson was born in Claiborne County, Tennessee, of parents both of whom were part Indian, the father a Cherokee and the mother, whose name was Margaret Condry, a Creek; that their parents were married in Claiborne County, Tennessee, in 1841, as shown by a marriage license, which is on file in the record; that Jackson was born in 1842, his mother dying at his birth, or soon thereafter; that his father, James Barnett, never again married, but near the outbreak of the Civil War took his son, Jackson, to Missouri, and was there killed about 1860; and that Jackson lived with an uncle till about the close of the Civil War; and then went to the Indian Territory, and became a member of his mother's tribe, and his name was entered on the tribal roll in 1882, which is the first

time that Jackson Barnett's name appears on any of the Creek rolls.

If the claim of this group is true, then the claim of all of the combined groups that Jackson Barnett was the son of Thesothle is false, and neither of said groups has any legitimate claim whatever upon any part of Jackson's estate. Upon the theory that the claim of the Rosa Allen Group is true, it is easily understood how each of the combined groups framed a plausible story to substantiate their claims. Jackson Barnett, a youth 18 or 20 years of age, drifted into the Creek tribe from Missouri. He heard of Siah Barnett, and having the same name, he probably in a way attached himself to Siah. Whether or not Siah was ever married to Thesothle is not substantiated by this record. They probably co-habited, and doubtless were pretty closely associated. Thesothle certainly did not possess a good reputation for virtue because there is no claim upon the part of the combined groups that Haryarechee, the ancestor of the third group, and his brothers, Tecumseh and Joe, who died without issue, were legitimate. The first group necessarily claims that Siah and Thesothle were husband and wife. Otherwise, they could have no interest in the estate. It appears that Thesothle lived but a short time, and Siah subsequently, or possibly had theretofore, married Mary. Jackson was left drifting around in the tribe, and the omission of his name as a son of Siah in the claim against the Government certainly shows that he then had no connection with the family. But he was always treated as a full member of the tribe. When Jackson died and the contest arose over the estate, it was a simple matter for the children of Siah Barnett by his wife, Mary, to concoct the story that their father Siah was also the father of Jackson; and in hunting around for a mother they landed upon Thesothle. Group No. 2, probably taking the cue from Group No. 1, agreed with them that Thesothle

was the mother of Jackson, but denied that Thesothle and Siah were ever married; and consequently claimed that they were the nearest of kin to Jackson's mother. The third group naturally agreed that Thesothle was Jackson's mother; but claimed that she had other children besides Jackson, two of whom died without issue, and that they were descendants of the third. No persons living can possibly know better the truthfulness or falsity of these claims than the members of the three groups, and those intimately associated with them. As heretofore pointed out, the sustaining of the claims of Group 1 would be absolutely fatal to the claims of Group 2 and the sustaining of the claims of Group 2 would be fatal to the claim of Group 1. Furthermore if the claims of group 3 were sustained, those of Group 2 would be eliminated. But if it were established that Haryarechee was a son of Thesothle and that Jackson was also her son by Siah, and born in wedlock, then Group 3 would participate along with Group 1 in the division of the estate. However, the amount that would be received by Group 3, if such relationship were established, would be so small in comparison with the entire estate, which Group 3 would receive if Jackson, like Haryarechee, was illegitimate, the contention between Groups 1 and 3 was naturally very earnest. Under these conditions what was necessarily the effect of the agreement by which **all the members of the three groups united to prosecute all their claims as a unit.**

What does this agreement provide? In closing a lengthy preamble it recites that "The premises considered, the parties hereto believe that it will be to their best interests for them to unite in their best efforts to contest and defeat each of said other claims, and not to oppose each other, and in so doing they will not only protect their own legitimate interests, but will also promote the ends of justice and facilitate an early conclusion of this litigation," and then follows these covenants:

(1) "The persons constituting each of the groups of the parties hereto will co-operate with the persons constituting each of the other groups of the parties hereto in the prosecution of the claims of each group in this suit and in defending against all other claims now pending or that may hereafter be filed in said suit" (Clk. Tr. p. 487).

(2) "The persons constituting each of the groups of parties hereto shall continue to prosecute their claims, and each group shall bear and pay the expense by it incurred in establishing the relationship of its members to Jackson Barnett" (Clk. Tr. p. 487).

(3) Provides that the expenses theretofore accrued by either group were to be paid by such group (Clk. Tr. p. 487).

(4) Provides that the expenses of contesting and combating the claims of all parties to the contract should be borne and paid in the proportion of 50 per cent by Group 1 and 25 per cent by each of Groups 2 and 3. And a committee was created to determine the necessity or propriety of expenditures and to supervise the handling and expending of the funds (Clk. Tr. p. 487).

(5) "In the event that the court shall find that any person or persons in any group of the parties hereto is or are the heir or heirs of Jackson Barnett, then the estate of Jackson Barnett, or any part thereof, whether real, personal or mixed, so awarded to such person or persons shall be taken and deemed to have been awarded for and on behalf of the persons constituting the three groups of parties hereto"; and it is specified exactly how the division should be made (Clk. Tr. p. 489).

(6) "If any person belonging to either group be held to be entitled to any portion of the estate, the court is authorized and directed to enter a decree giving 50 per cent of the award to the first group, 25 per cent to the second and 25 per cent to the third group" (Clk. Tr. p. 490).

Special attention is called to the first and second provisions of the contract. In the first the persons constituting each group obligate themselves **to "Co-operate with the persons constituting each of the other groups of the parties hereto** IN THE PROSECUTION OF THE CLAIM OF EACH GROUP IN THIS SUIT **and in defending against all other claims now pending,"** etc. That is, the members of the first group agree to co-operate with the second group in proving that Siah Barnett was not the father of Jackson Barnett, or if his father, that Jackson was not born in wedlock. On the other hand, the second group agree to co-operate with the first group in proving that Siah Barnett and Thesothle were husband and wife, and that Jackson was their legitimate child; and the third group agree to co-operate with the first group in proving that Jackson was the legitimate child of Siah and Thesothle, and that they will also co-operate with the second group in proving that Jackson was not the legitimate child of Siah and Thesothle. In the second covenant, which was inserted to give some semblance of legitimacy to the contract, each group covenanted that its members would "continue to prosecute their claims." These two covenants when read together are perfectly absurd, and clearly show that the combination was nothing but a conspiracy to prepare a record which would induce a court to hold that the estate belonged to one of the groups, or to some member of one of them; and thereafter it was a matter of indifference which group, or member of a group, should be picked as a winner.

When the agreement was entered into the contest between the groups had become bitter; and they were destroying their respective claims. The status of the record at that time was such as to justify the inference that the respective groups knew of the falsity of the claims of the others, and that if their antagonism continued the result

would be the elimination of all of them from the contest; and they themselves being the persons who were more familiar than anyone else with the real facts regarding Jackson Barnett, they concluded that if they could become reconciled, and withhold from the court the truth about his parentage, they could, with the assistance of the government agents and the United States Attorney's office, combat successfully the claims of all other groups, and succeed in having the estate divided between them. As a result of this combination, no further effort was made to prove the truth about Jackson Barnett's parentage, but a fierce battle was continued against other claims.

In this connection the following language of the court of appeals is especially significant. In speaking of the muddled condition of the record at the time the contract was made and of the difficulty of reaching the truth about Jackson's relationship, if any, to the various claimants, the court said: "Some of the oral testimony and most of the documentary evidence which tended to support the claims of the persons constituting the other two groups had been introduced." This statement is enlightening, though not in the way the court interpreted it. In fact, each of those groups had introduced very damaging evidence, both oral and documentary, against the other groups before this agreement was entered into, **but they did not introduce evidence of such character after it was entered into.** If the agreement had been made in the beginning of the contest there is not the least likelihood that **any of such damaging evidence, either documentary or oral, would have been introduced.** The inherent tendency of the agreement was to suppress all evidence of that character. Consequently, this reservoir of information in which rested the most important evidence bearing upon the birth and life history of Jackson Barnett was hermetically sealed; and thereafter nothing escaped therefrom that had any material bearing upon that subject.

Analysis of the Opinion of the Court of Appeals.

We may accept the principles of law enunciated by the Court of Appeals relating to contracts which are against public policy because of their effect upon Court proceedings. In fact, it is doubtful whether they are more clearly or more accurately stated elsewhere than as given in its opinion. The Court upon that subject said:

> "A contract which **by its inherent tendency** is inimical to public welfare or inconsistent with good morals violates public policy and will not be enforced, either directly or indirectly. **The validity of a contract in point of being against public policy must be measured by its inherent tendency, not the good faith of the contracting parties or the manner in which they carried it out.** And the success or failure which attends the fulfillment of a contract tainted with trespass upon public policy is without moment. This comprehensive doctrine is of such long standing and wide familiarity that it cannot be necessary to review the cases without number in which a great variety of contracts have been uniformly overturned.
>
> "It is equally well settled that an agreement relating to a suit or proceeding in court **which invites or promotes interference with full and impartial justice therein violates public policy and will not be enforced in any manner, though no actual corruption is involved**" (122 Fed. [2d], pp. 777, 784).

And the Court cites and states the facts and holdings in a number of cases in support of those principles.

Now let us compare with that statement of the law governing the case the grounds upon which the Court maintained the validity of this contract.

After stating the difficulties in ascertaining the true facts with reference to the relatives of Jackson Barnett, and that much of the oral testimony and documentary evidence

on that subject had already been introduced, the Court said, in substance, that the persons constituting each of the three groups claimed to be the next of kin to deceased, but the evidence introduced and their investigation had convinced them that the members of the other groups were related to Jackson, but each group were yet contending that they were the **nearest** relatives; and they all agreed that the other forty-seven contestants were entitled to no part of the estate; or, "stated otherwise, they united in the belief that they all were related to the decedent and in the contention that the claims of all forty-seven groups of claimants were unfounded and without merit." The Court further said it was difficult and expensive to combat and defeat such a large number of claimants, and the labor and expense was too much for any one of the three groups; and that attorneys of widely-recognized ability and professional integrity representing the different groups testified that they participated in the negotiations leading up to the preparation and execution of the agreement; that the enormous labor and expense required to make the investigation and produce the evidence necessary to overcome the proof offered by certain claimants, notably Bertha Barnett, Henry Barnett and Mayetta Kingston, were the major factors which induced the parties to enter into the agreement, and that the suppression or withholding of any evidence was never suggested, discussed, or practiced; that they testified without qualification or condition that no pertinent evidence coming to their attention or knowledge had been concealed, or withheld, or excluded from the record; and that the contract expressly provided, among other things, that the members of each group would continue to prosecute their claims; and the approval of the Acting Secretary of the Interior, which was essential to the contract becoming binding upon the parties, was subject to the condition that all available evidence should be fully and fairly presented to the Court; that the agreement was

not conceived and preserved in secrecy; and that the Assistant United States Attorney attended some of the negotiations leading up to its execution.

In the first place, attention is specially called to the fact that in assuming these recitals to be facts and considering them as grounds for affirming the decree of the trial Court, the Court of Appeals disregarded the principles which it had so clearly and forcibly stated as being determinative of the validity of a contract of this nature, to wit: **"The validity of a contract in point of being against public policy must be measured by its inherent tendency, not the good faith of the contracting parties or the manner in which they carried it out."** It was not for the Court to consider the inducements which brought about the contract **except as an incident in determining its inherent tendency.** And certainly consideration should not have been given to the ability and reputation for integrity of the counsel giving testimony as to how they had proceeded under the contract, as its validity **must be determined solely from its inherent tendency.** The general principle that contracts of this nature are against public policy is based upon the obvious fact that it is inimical to the public welfare to permit human nature to be subjected to the temptation of making an improper use of such combinations and agreements; that while a set of gentlemen may be of the finest kind of reputation and may possess unblemished integrity and may make the utmost endeavor to act with entire fairness, yet a contract conceived, formulated and carried out by them, **if its inherent tendency is to subvert the ends of justice, will be declared void.** To hold otherwise would require each case, regardless of the inherent nature of the contract involved, to be determined upon its own extrinsic facts; what, however, one's reputation for integrity may be, it can never be known what effect strong personal interest may have upon his conduct.

The insistence that it was expensive to overcome the proof introduced in support of other claimants is certainly entitled to no consideration. Apparently the other groups were not composed of as large numbers as were these three, and each had financed the prosecution of its own claim. Why should either of these groups be exempted from incurring a like burden? Suppose a large number of competing groups had joined together and raised a large fund to combat the claims of these three groups either in combination or separately; and had stipulated that regardless of the merits of the respective claims of the groups, if either individual connected with either of them should prevail, they would divide recovery between them; can it be believed that either of the Courts below would have sustained such a stipulation?

The fact that there was no secrecy about the contract is not in its favor. It had to be approved by the Secretary of the Interior, and consequently its secrecy could not be maintained. Recent experiences have demonstrated that open, vigorous propaganda is a very effective weapon; and the terror inspired by the activities of these groups, and of the agents working on their behalf, all of which resulted from this combination, was far more effective than the agreement could have possibly been if its existence had been kept secret.

Nor is the fact that the contract was approved by the Secretary of the Interior entitled here to the least consideration in determining whether the contract was against public policy. This is demonstrated from the advice which was given him by the solicitor of the Interior Department in a communication recommending the approval of the contract in the following language quoted from an opinion received from the Attorney-General: "It has been suggested that the contract may be against public policy, but it is not entirely clear that this is true. The United States

Attorney in charge of the litigation has stated his approval of the contract and has also discussed the matter with the United States District Judge. The latter has indicated his view that the contract probably 'would not be against public policy.' Considering all the circumstances, and since the arrangement proposed is not a secret one and is subject to approval by several Courts, it would appear that you are under no compulsion to withhold your approval of said agreement because of a mere doubt. The parties are entitled to a presumption of legality and ought to be accorded their day in court upon this issue, if raised by an interested party" (Clk. Tr. pp. 497-498). Manifestly the Attorney-General had a most serious doubt about the validity of the contract; and suggested rather than advised its approval in order that the Courts might have an opportunity to pass upon it. Furthermore, if the statement of the trial Judge is true he had in fact expressed no opinion about its validity; and the information given by the United States Attorney to the Attorney-General was false.

Another ground upon which the Court of Appeals held the contract valid was that it partook of the nature of a family settlement; and a number of cases are cited in which it was held that the Courts look with favor upon the voluntary adjustments of conflicting claims by family settlements. And an effort was made by the parties to camouflage the contract by the pretense that it was a family settlement. The very first words of the instrument are: "This agreement, in the nature of and intended as a family settlement is made and entered into" (Rec. p. 480). In fact, the agreement is in no respect a family settlement; and no authority can be found which can justify its construction as such. In **Black's Law Dictionary**, under the word "Family," "family settlement" is said to be "a term of practically the same signification as 'family arrangement' "; and "family arrangement" is de-

fined: "A term denoting an agreement between a father and his children, or between the heirs of a deceased father, to dispose of property, or to partition it in a different manner than that which would result if the law alone directed it, or to divide up property without administration. In these cases, frequently, the mere relation of the parties will give effect to bargains otherwise without adequate consideration." The Court cites the case of **Burns v. Burns**, 137 Fed. 781, as bearing upon this question, but that case involved the disposition by will of a person's estate to two brothers; and the rights involved were those of the children of the deceased, and of the two brothers and their descendants. And in an examination of **Words and Phrases** no case will be found which suggests that the principle invoked extends beyond the limits of an immediate family.

If there had been no claimants other than these three groups, with some reason it could be insisted that **the paragraphs of the agreement which relate to the distribution of the estate** partake of the nature of a family settlement. But here are fifty groups of claimants. Three of them base their claims upon the alleged fact that Thesothle was Jackson's mother. Many, if not nearly all, of the other forty-seven groups deny that this woman was the mother of the Jackson Barnett who was the owner of the estate in question; and each advances a claim wholly separate and distinct from all of the other groups. One group claims to be direct descendants of Jackson, and it is immaterial to them who his mother was. Now, what right have the three groups who agree upon his maternal ancestor to get into a huddle, and, using a contingent division of the property, which has not yet been adjudged to belong to either of them, as a consideration for a contract, the very object of which is to combat the claims of all other parties for the property, and to withhold from the

court all evidence in the possession of either of them which would militate against the claims of either of the others? Such was bound to have been the purpose, as well as the effect, of the contract; for how else could they "co-operate"? If the second or third group had evidence that Siah Barnett was not the father of Jackson, could they "co-operate" with the first group by presenting it to the court? And can it be believed that any member of either group did not thoroughly understand that thereafter he was to reveal nothing that would be injurious to either group, but was to do all that he reasonably could to assist in maintaining any claim advanced by either group? In fact, the second covenant, that each group would continue to prosecute their claim, is in accord with this conception of the contract. Necessarily, if either group thereafter had failed to further prosecute its claim, it would not have given the other two groups an opportunity to co-operate with it, nor would it to that extent have been co-operating with them. The two covenants, when read together, mean that each group would present all evidence favorable to itself or to either of the other two groups, but would produce no evidence unfavorable to either group; and, further, that all would unite in an attack upon each of the other groups.

Even if it could be held that this contract is of the nature of a family settlement as between the parties thereto, yet no court has ever held that even a family settlement which reaches out beyond the family, and unfavorably affects the rights of other parties in a litigation then pending, is valid as to such parties.

Before entering upon a discussion of the validity of the agreement between the three groups, the Court made the following statement with reference to the conclusion which it had reached:

"There were many sharp inconsistencies and irrec-

> concilable conflicts in the evidence, but they were for the determination of the trial court. It may be said in summary that a painstaking review of the voluminous record convinces us that, despite the quantum of countervailing evidence, the determinative findings of the Court are adequately supported by substantial evidence, implemented by the stipulation referred to, and are not clearly erroneous, due regard being given to the opportunity of the trial court to judge of the credibility of the witnesses and the weight to be given to their testimony" (122 Fed. [2d], pp. 777, 782).

And in closing its opinion, after stating that the Court was not to be understood as approving all of the statements, comments and criticisms coming from the Court, or the excessive interference with the attorneys in the examination of the witnesses, the Court said in conclusion:

> "We think the Court reached the right conclusion in the end; another long and expensive trial, without the incidents of which complaint is made, would in all probability conclude with like findings of fact and judgment; and the ends of justice would therefore not be furthered with a reasonable dispatch by ordering a new trial" (122 Fed. [2d], pp. 777, 789).

From these statements of the Court it is evident that there was no certainty in the Court's mind that a correct conclusion had been reached; and the use of the word "probability" clearly justifies the inference that the Court thought it not "improbable" that in a second trial a different disposition of the estate of Jackson Barnett would be made.

The Court correctly stated that in order to affirm the judgment it was necessary that the evidence be "implemented," that is, "completed" or "supplemented," by the agreement. With it absent no record could possibly be made upon which the disposition of the property made by the Court could be upheld. As each of the three groups

would have to depend for recovery upon the merits of their own claim, the evidence introduced to establish their merits would in all probability show that the merits of neither of them would be so clearly proven as to justify a decree in their favor.

The conduct of the trial Judge and the unusual activities of the United States Attorney's office, all favorable to the combined groups, and antagonistic towards all other groups, were pressed upon the Court of Appeals. While that Court took the view that proper steps had not been taken to secure the assignment of another Judge to try the case, yet they did recognize the fact that during the proceedings things were done of which they could not approve. And we respectfully submit that it is obvious from the record that no claimant received a fair and impartial hearing, the combined groups being unduly favored, while due consideration was not given to the claims of other groups. However, we will not lengthen this brief and argument with a recital of the incidents which indicate such partiality.

For the foregoing reasons the decree of the Trial Court and of the Court of Appeals should be reversed, and the cause be remanded to the District Court with direction that a decree be entered in favor of these petitioners, or that a new trial be had.

Respectfully submitted,

J. A. FOWLER,
Counsel for Petitioners.

H. G. FOWLER,
S. F. FOWLER,
WM. C. WILSON,
Of Counsel.

JAN 26 1942

In the Supreme Court

of the United States

No. 825—October Term, 1941.

DORA BRADY AND LUCINDA WATKINS,

Petitioners,

vs.

ANNIE BEASLEY, [illegible]

Respondent.

ANSWER BRIEF TO THE PETITION FOR CERTIORARI.

W. T. ANGLIN,
ALFRED STEVENSON,
DICK JONES,
LEON C. PHILLIPS,
E. W. SMITH,
CHARLES A. MOSER,
FRANCIS STEWART,
JOSEPH C. STONE,

Attorneys for Appellee Group 2.

INDEX.

PAGE

SUBJECT INDEX.

Statement 1

Petitioners' mis-statements of fact 8

The charges of bias and prejudice upon the part of the trial judge, and the alleged failure of the court to grant a fair trial 13

The circumstances in which the matters complained about arose 13

The trial judge 14

The petitioners had a fair and impartial trial, free from bias or prejudice upon the part of the trial judge.

(1) Petitioners erroneously assume and charge that the appearance of the United States, together with the acts of its officers during the course of the trial, was wrongful and unauthorized by law, and that this improperly influenced the trial judge in favor of the respondents and against all other claimants .. 15

(2) The Family Settlement Agreement is valid and did not tend to prejudice the trial court 19

The contract was a conveyance by the members of each group to the members of each of the other two groups, of all such right, title and interest as was held by such members in and to the Jackson Barnett estate, as was necessary to vest in each of the groups, and in the members thereof, the proportionate parts of said interest in the estate provided for in said contract 22

PAGE

By various Acts of Congress the allotment of Jackson Barnett is restricted against alienation, and the royalties accrued therefrom, which are held by the Secretary of the Interior, under his supervision and control, are likewise restricted. It was therefore necessary that the Secretary of the Interior and the several county courts of Oklahoma which approved the contract, should approve the instrument..... 22

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government..... 24

(3) Petitioners are foreclosed upon their claims of heirship by the tribal or town rolls of the Creek Nation, and by the final citizenship rolls made by the Commission to the Five Civilized Tribes, commonly known as the Dawes Commission.

The findings of the Commission are conclusive upon all questions which relate to the right of enrolment and allotment of lands. The findings of the Commission, which appear upon the final enrollment records as descriptive of enrolled Creek citizens, such as the tribal town to which the citizen belonged, parentage, sex, and the like, are at least prima facie evidence of the facts found, and these findings are entitled to such great weight that they cannot be overcome, in the absence of clear, unambiguous and convincing countervailing evidence clearly establishing error or mistake..... 27

Exhibits—Final roll of Jackson Barnett and of Albert Brady (opposite)..... 31

(4) The manifestly false and absurd claims of petitioners, the improper methods by which the claims were

PAGE

presented, counsel's disregard of the enrolment records, the introduction of much wholly incredible oral evidence, together with other provoking circumstances, brought about the statements from the trial judge which are here criticised..... 33

(5) The alleged disqualification of the trial judge..... 39

The affidavits filed herein were not timely..... 39

The affidavits filed herein were insufficient as a matter of law. The alleged bias and prejudice is not of the kind or nature contemplated by the statute..... 40

The statements and acts of the trial judge with respect to the Family Settlement Agreement, including his conference with the Assistant United States Attorney were in accord with strict propriety, and same do not evidence even the slightest bias or prejudice against the complaining parties.. 41

It is erroneously assumed that the Family Settlement Agreement is against public policy, and that on account of the Family Contract the trial judge was biased in favor of the parties to the contract, and prejudiced against all other claimants..... 41

Table of Cases.

Amer. Brake Shoe & Fdry. Co. v. *Interborough Co.* (D. C.), 6 Fed. Sup. 215..... 40
Anchor Oil Co. v. *Gray*, 256 U. S. 519, 65 L. ed. 1070.... 22
Anderson Coal Co. v. *Waban* (D. C.), 178 Fed. 945.... 40

Barnett v. *Equitable Trust Co.*, 21 F. (2d) 325.....16, 42
Barnett v. *Equitable Trust Co.* (2nd Cir.), 34 F. (2d) 916, 918.....16, 41
Barnett v. *United States* (9th Cir.), 82 F. (2d) 765..... .....16, 35, 37, 41
Benedict v. *Seiberling* (D. C.), 17 F. (2d) 831, 836....40, 41
Berger v. *U. S.*, 255 U. S. 22, 65 L. ed. 481.....39, 40

PAGE

Bishop v. *U. S.* (8th Cir.), 16 F. (2d) 410 40
Bommarito v. *U. S.* (8th Cir.), 61 F. (2d) 355 40
Bowles v. *U. S.* (4th Cir.), 50 F. (2d) 848 40
Branch v. *Hanrick*, 70 Tex. 731, 8 S. W. 539 21
Burnes v. *Burnes*, 137 Fed. 781 21
Burrough of Hasbrouck v. *Agrios* (D. C.), 10 Fed. Sup. 371 40

Caesar v. *Burgess* (10th Cir.), 103 F. (2d) 503 .....16, 41
Chafin v. *U. S.* (4th Cir.), 5 F. (2d) 592 40
Cox v. *Colbert*, 135 Okl. 218, 275 Pac. 317 27
Craven v. *United States* (1st Cir.), 22 F. (2d) 605 41
Cuddy v. *Otis*, 33 F. (2d) 577 41

Davis v. *Securities Commission* (7th Cir.), 109 F. (2d) 6 39
Duncan v. *U. S.* (9th Cir.), 48 F. (2d) 128 40

Ex parte Amer. Steel Barrel Co., 230 U. S. 35, 57 L. ed. 1379 40
Ex parte Fairbank Co., 194 Fed. 978 40

Folk v. *United States* (8th Cir.), 233 Fed. 177 .....27, 30

Hall Lumber Co. v. *Gustin* (Mich.), 20 N. W. 616, 619 .. 20
Halsell v. *Beartail*, 107 Okl. 103, 227 Pac. 392 27
Heckman v. *United States*, 224 U. S. 431, 56 L. ed. 820 .. ..16, 24, 41

In re: Lisman (2nd Cir.), 89 F. (2d) 898 40

Johnson v. *U. S.* (D. C.), 35 F. (2d) 355 40

Kiefer Oil & Gas Co. v. *McDougal* (8th Cir.), 229 Fed. 934 21

Lipscomb v. *U. S.* (8th Cir.), 33 F. (2d) 33 40
Lone Wolf v. *Hitchcock*, 187 U. S. 553, 47 L. ed 299, 306 .....23, 24
Lusk v. *Green*, 114 Okl. 113, 245 Pac. 636 21
Lykins v. *McGrath*, 184 U. S. 169, 46 L. ed. 483 24

PAGE

Minnesota & Ontario Paper Co. v. *Molyneaux* (8th Cir.), 70 F. (2d) 545 40

Nations v. *U. S.* (8th Cir.), 14 F. (2d) 507 39

Parker v. *New England Oil Corp.* (D. C.), 13 F. (2d) 497, 498 40
Purdue v. *Purdue*, 81 S. W. 633 21

Sango v. *Parks*, 44 Okl. 223, 143 Pac. 1158 21
Saunders v. *Piggly Wiggly* (D. C.), 1 F. (2d) 582 ....40, 41
Scott v. *Beams, et al.*, 122 F. (2d) 777 .....8, 26, 42
Shea v. *U. S.* (6th Cir.), 251 Fed. 433 40
Sieve v. *Steinridge*, 1 S. W. 672 21
Sloan v. *Moffatt*, 41 Iowa 271 21
Swift v. *Black Panther Oil & Gas Co.* (8th Cir.), 244 Fed. 20, 29 39

Tiger v. *Western Investment Co.*, 221 U. S. 286, 55 L. ed. 738 41

United States v. *Buck* (D. C.), 18 Fed. Sup. 827 40
United States v. *Buck* (D. C.), 23 Fed. Sup. 508 40
United States v. *Equitable Trust Co.*, 283 U. S. 738, 75 L. ed. 1379 .....16, 42
U. S. v. *Flegenheimer*, 14 Fed. Sup. 584 .....40, 41
United States v. *Getzelman*, 89 F. (2d) 531 22
United States v. *Gilbert* (D. C.), 29 Fed. Sup. 507 41
United States v. *Mid-Continent Petroleum Corp.* (10th Cir.) 67 F. (2d) 37 .....16, 27, 32, 41
United States v. *Mott* (D. C.), 33 F. (2d) 340 .....16, 41
United States v. *Mott* (10th Cir.), 37 F. (2d) 860 .....16, 41
U. S. v. *Parker* (D. C.), 23 Fed. Sup. 880 40
U. S. v. *Wildcat*, 244 U. S. 111, 61 L. ed. 1024 .....27, 28

Vinson v. *Cook*, 76 Okl. 46, 184 Pac. 97 21

Williams v. *First Nat. Bank*, 216 U. S. 582, 44 L. ed. 625 21

PAGE

Acts of Congress.

Act of May 27, 1908 (35 Stat. 312) 17, 23
Act of April 12, 1926 (44 St. L. 239) 17, 23
Act of January 27, 1933 (47 St. L. 777) 17

Statutes.

Sec. 21 of the Judicial Code (28 USCA, Sec. 25) 39, 42
Sec. 1366, Okla. Stat. 1931 21

Text Books.

12 C. J. p. 322 21
18 C. J. 887, Sec. 157 20
18 C. J. 888, Sec. 158 20
18 C. J. 898 21
24 C. J. 930 21
C. J. S. p. 749, par. 30 20
Pomeroy's Equity Jurisprudence, Third Edition, Vol. 2, p. 1500, par. 850 21
5 R. C. L. 880, "Compromise and Settlement" 21

Court Rules.

Rule 38, Sections 2 and 3, Rules of the United States Supreme Court 1, 2

In the Supreme Court of the United States

No. 829—October Term, 1941.

DORA BRADY AND LUCINDA WATASHE, *Petitioners,*

vs.

ANNIE BEAMS, *ET AL., Respondents.*

ANSWER BRIEF TO THE PETITION FOR WRIT OF CERTIORARI.

Statement.

Nothing whatever has been served upon respondents except a printed copy of the petition for writ of certiorari and the brief attached thereto, consisting as a whole of 145 pages. For convenience we hereinafter sometimes refer to the petition and the attached brief as "the petition".

We respectfully challenge the sufficiency of the petition, together with its supporting brief, and ask for its dismissal or, in the alternative, for a denial of the writ, for failure to comply with the applicable rules of this Honorable Court, particularly Rule 38, and for failure to show cause for the issuance of the writ. As one ground for dismissal of the petition or, in the alternative, denial of the writ, we contend that petitioners have failed to meet the requirements of Section 2 of Rule 38, which provides as follows:

> "*2.* The petition shall contain only a summary and short statement of the matter involved and the rea-

sons relied on for the allowance of the writ. A supporting brief may be included in the petition, but whether so included or presented separately, it must be direct, concise and in conformity with Rules 26 and 27. A failure to comply with these requirements will be a sufficient reason for denying the petition. * * *"

As further ground for dismissal of the petition or denial of the writ we invoke Section 3 of Rule 38, which provides:

"*3.* Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, shall be served by the petitioner on counsel for the respondent within ten days after the filing, and due proof of service shall be filed with the clerk. * * *"

And as further ground for dismissal of the petition or denial of the writ we show that the petition is fatally incomplete, in that it does not cover the subject-matters necessary for consideration in such instances. Whilst proceeding upon the theory that certiorari should be granted for want of a fair trial in the district court, the petitioners wholly, or almost entirely, fail to present the material parts of the vast record which shows, as we contend, that they had a fair trial, and that frauds and misconduct upon the part of and in behalf of the petitioners and their witnesses, and misconduct upon the part of one or more of their counsel, brought upon the petitioners the criticisms of the trial judge, about which complaint is here made. Petitioners merely present an abstract of their own evidence in chief, and invite the respondents to present the vast record of the proceedings upon which the judgment was entered.

The petition, together with the brief attached, is a mixture of some truth, many mis-statements of fact, and

counsel's erroneous conclusions both with respect to the facts and the law, so compounded and confused that it is not reasonably possible to separate the parts thereof.

Petitioners make respondents' three-volume brief filed in the Circuit Court of Appeals, Vol. II of their Appendix. Vol. I of respondents' brief contains a statement of the case, the findings and conclusions of the trial court, an abstract of the evidence introduced upon behalf of the respondents, the prevailing parties, and argument of counsel, with authorities, as to the effect of the evidence offered by respondents. Vol. II contains the respondents' answer brief to the several briefs filed upon behalf of the appellants in the Circuit Court of Appeals. The claims of Dora Brady and Lucinda Watashe are discussed in Vol. II commencing at page 153. Vol. III consists of respondents' brief with respect to the alleged disqualification of the trial judge, the alleged unfairness of the trial court, and the Family Settlement Agreement.

In the event this Court desires to examine said three volumes of respondents' brief in the Circuit Court of Appeals, or any part thereof, we respectfully call attention to the index of said three volumes, which so far as appears applicable, is as follows (the authorities cited are here omitted):

"VOLUME I.

PAGE

Statement 1

The court's findings of fact and conclusions of law 2

The clear weight of the evidence documentary and oral, sustains the findings of the trial court in favor of the appellees and against all other claimants 16

GROUP I (Fisher, *et al.*)—Evidence and Argument.. 16

Authorities on question of estoppel:

Authorities on question of judgment in prior action:

Findings of the Dawes Commission which appear upon the enrollment records as descriptive of an enrolled Creek citizen, such as the tribal town to which the citizen belonged, parentage, sex, and the like, are at least prima facie evidence of the facts found, and these findings are entitled to such great weight that they cannot be overcome in the absence of clear, unambiguous and convincing countervailing evidence clearly establishing error or mistake..... 51

GROUP II. (The Conner Group)..... 59

GROUP III. (The Stepney-Gouge Claimants)..... 66

VOLUME II.

ANSWER TO THE SEVERAL BRIEFS UPON BEHALF OF APPELLANTS..... 71

* * * * * * *

The claims of Dora Brady and Lucinda Watashe.. 153

The trial court's findings..... 153

The documentary evidence..... 157

Testimony of witnesses upon behalf of Dora Brady and Lucinda Watashe..... 168

VOLUME III.

THE ALLEGED DISQUALIFICATION OF THE TRIAL JUDGE.

Upon the filing of an affidavit to disqualify the trial judge upon the ground of personal bias and prejudice, under the provisions of Sec. 21 of the Judicial Code (28 USCA, Sec. 25), it is the duty of the trial judge to pass upon the timeliness and legal sufficiency of such affidavit. If the affi-

davit is legally insufficient it is the duty of the trial judge to proceed..... 177

(a) The affidavits filed herein were not timely... 178

(b) The affidavits filed herein were insufficient as a matter of law..... 187

(1) The alleged bias and prejudice is not of the kind or nature contemplated by the statute..... 187

(2) The statements and acts of the trial judge with respect to the Family Settlement Agreement, including his conference with the Assistant United States Attorney, were in accord with strict propriety, and same do not evidence even the slightest bias or prejudice against the complaining parties..... 192

(3) The certificates of counsel as to good faith were not in conformity with the statute..... 197

The appellants had fair and impartial trials, free from bias or prejudice upon the part of the trial judge.

(a) The circumstances in which the matters complained about arose impelled the trial judge to the acts criticized..... 199

(b) The charges of bias and prejudice are thoroughly discredited, because they are wholly inconsistent with the well known unimpeachable character and reputation of the trial judge..... 200

(c) The charges of bias and prejudice rest upon two false assumptions, to-wit: *(1)* It is erroneously assumed that the appearance of the United States upon behalf of the contracting parties to the Family Settlement Agreement was wrongful, and that this appearance by the United States improperly influenced the

trial judge in favor of the contracting parties and against all other claimants: and *(2)* It is further erroneously assumed that the Family Settlement Agreement is against public policy, and that on account of the Family Contract the trial judge was biased in favor of the parties to the contract, and prejudiced against all other claimants..... 201

(d) The high points in the appellants' briefs with respect to bias and prejudice further examined. All matters pointed out by appellants are consistent with entire judicial fairness... 208

The family settlement agreement of June 30, 1936, entered into by Seaborn Fisher, *et al.*, called Group I, Nettie Conner, *et al.*, called Group II, and Earnest Gouge, *et al.*, called Group III, is valid.

(a) The provisions of the contract, the contentions of the parties as to its meaning, effect, and manner of performance, and the findings, conclusions, and judgment of the court with respect thereto..... 218

Contract of Family Settlement—The court's findings thereon..... 220

Excerpts from the contract..... 226

Approval of the instrument by the Secretary of the Interior..... 231

(b) Only parties to a settlement agreement may avoid it by suit. Appellants are strangers to the agreement, and therefore have no standing in court to impeach its validity..... 233

(c) Compromises are favored by the courts; and the most favored of all compromises are contracts of family settlement..... 235

(d) One claiming to be an heir may sell, assign and transfer his interest in an estate during or prior to administration and before a decree

of distribution is rendered, and his assignee or grantee will "step into his shoes", and if the assignor or grantor is adjudged to be an heir, the assignee or grantee will receive distribution in his stead..... 239

(e) The parties to the Family Settlement Agreement became, as of the date of their contract, June 30 1936, and long before the commencement of the trial, owners in common of all the right, title and interest of the contracting parties in and to the estate here involved. They could then, as such owners in common, do anything for the protection of the common title which the courts ordinarily permit owners in common to do. The contract did not require that any party thereto should do or refrain from doing anything out of ordinary and lawful course when a common title is attacked.. 241

(f) The authorities cited by appellants in support of their contention that the settlement agreement is against public policy are not in point; they are wholly inapplicable. The Family Settlement Agreement is not against public policy. There is nothing in the contract which even tends to invite suppression of evidence. There is nothing in the contract which contemplates or suggests the use of unlawful means. The evidence as to the manner in which the appellees performed their respective duties under the agreement is all to the effect that suppression of evidence was never contemplated; that in fact and in truth the parties to the contract offered all available evidence, as required by the order of approval by the Secretary of the Interior.....248"

The subject-matter of these three volumes, as appears by mere reference to the part of the index above set forth, shows that petitioners have failed to present anything what-

ever covering the vast field embraced in respondents' brief. Petitioners pass over, as if of no importance, the extended evidence, documentary and oral, upon behalf of the three successful groups, abstracted and discussed in Vol. I under the head "The clear weight of the evidence documentary and oral, sustains the findings of the trial court in favor of the appellees and against all other claimants."

Thus petitioners attempt to show, merely from the proceedings when they were putting on their evidence in chief, that the trial judge was disqualified, that the trial court did not give the petitioners a fair trial, and that the Family Settlement Agreement is void. For important parts of the evidence introduced by the three successful groups, see the many exhibits introduced upon behalf of respondents and the testimony of the witnesses upon their behalf. All these matters are fully abstracted and discussed in Vol. I of respondents' brief filed in the Circuit Court of Appeals.

A correct understanding of the history of the case and the issues of fact and of law heard and determined, may be obtained from the trial court's findings of fact and conclusions of law (Clk. Tr. Vol. 2, pp. 1132-1181). A more concise history is contained in the decision of the Honorable Circuit Court of Appeals for the Tenth Circuit, reported as *Scott* v. *Beams, et al.*, 122 F. (2d) 777.

We here attempt to avoid discussion of the merits, except incidentally and only in so far as we deem it necessary to show that the writ should not issue.

Petitioners' Mis-statements of Fact.

We contend that the petition should be dismissed, amongst other reasons, because of its many mis-statements with respect to the vital facts of the record. There is an utter want of any true picture of the proceedings in the

trial court. These false statements are so numerous as to preclude a complete listing here. A considerable number are so manifest that they require no particular mention. Others are so flagrant, misleading, and cleverly done that they seem to require special attention.

Petitioners say, referring to the question of the identity of the Jackson Barnett whose estate is here involved, "Only one controlling issue of fact was presented and as to said issue there was no conflict in the evidence." In effect this is repeated often in the petition and brief. This statement is wholly false. A large part of the record made by respondents and claimants other than these petitioners was to establish the fact that the Jackson Barnett whose estate is here involved was the Jackson Barnett whose name appears on the Tuckabatchee Creek Indian tribal rolls introduced in the record, whose father was Siah Barnett, whose mother was Thlesothle, who was enrolled by the Commission to the Five Civilized Tribes upon the final roll opposite No. 4524, as a member of said Tuckabatchee Town, and who died in 1934. In the other hand, as will more particularly appear hereinafter, the Jackson Barnett through whom petitioners claim was a member of Hickory Ground Town of the Creek Nation and died prior to the final enrolment of and allotment to the members of said Creek tribe, as shown by the enrolment record in evidence.

Instead of want of conflict as to the identity of the allottee Jackson Barnett, as claimed by petitioners, there was the sharpest conflict upon the question.

At page 5 of the petition it is alleged, with respect to the trial judge and the family settlement agreement, that "Honorable Robert L. Williams actively assumed the lead in inducing the Attorney General and the Secretary of the Interior Department of the United States to approve and

carry out the said compromise agreement or family settlement * * *." There is nothing whatever in the record to support this charge. It is scandalous and contemptuous to the extent that the petitioners should not be heard in this Court.

When the family settlement agreement was before the Secretary of the Interior upon application for its approval, the Secretary referred the matter to the Attorney General for an opinion. The Attorney General, desiring to avoid even the appearance of contempt of the trial court, requested that the United States District Attorney for the Eastern District of Oklahoma ascertain whether or not the trial judge would deem the approval of the contract by the Secretary to be an act of contempt. Thereupon the Assistant United States District Attorney informed the trial judge that some of the full-blood Indians had entered into a family settlement agreement, which was under consideration by the Secretary of the Interior and the Attorney General, and inquired as to whether or not the trial judge would deem approval by the Secretary such invasion of the court's authority as to constitute contempt. The judge did not then know who the parties to the contract were, nor its terms. He never knew the terms of the contract, or who the parties thereto were, until the last day of the trial. The judge's response to the inquiry was merely this: He advised that he would not pass upon the contract unless and until it was presented to him in court; that he would have nothing to do with the contract until it reached him as a judge, but that so far as the approval of the agreement by the Secretary was concerned, he would not treat action upon the contract by the Secretary as contemptuous.

The testimony of the Assistant United States Attorney (Tr., p. 8532) is in part as follows:

"The Court: Now, Mr. Miller, didn't I tell you when you came in there that I wasn't going to have anything to do with that matter until it got to me as a judge?

A. Yes, sir.

The Court: And wouldn't express any opinion but that so far as I was concerned I wouldn't treat it as a matter of contempt?

A. Yes, sir, that is true."

The trial upon the merits closed June 23, 1938, with reservation for further hearing as to the family settlement agreement. Commencing February 27, 1939, the evidence and argument was heard with reference to the contract of settlement. The following colloquy occurred (Tr., p. 8508):

"The Court: They asked whether I would take that as contempt in settling this case. I told them I wouldn't but I wouldn't pass on it.

Mr. Pinson: Your honor never saw this contract?

The Court: No, I didn't know what it was. I never saw that contract until it was introduced in evidence.

Mr. Pinson: And I doubt if you have studied it.

The Court: I have never studied it. I have never passed on the merits of the contract."

This is the whole truth about the alleged connection of the judge with the contract, except that when its validity was challenged he requested the Circuit Court of Appeals to assign another judge to pass upon the contract, which request was refused.

At pages 4 and 5 of the petition it is alleged that the respondents "wrongfully induced" the Assistant United States District Attorney, without the knowledge of the petitioners, to contact the trial judge, the Solicitor for the

Secretary of the Interior, and the Secretary of the Interior, to procure approval of the family settlement agreement, and that said Assistant United States Attorney, with the "concurrence" of the trial judge, "secretly, wrongfully, improperly and collusively" took the lead in securing the approval of the contract, contrary to the duties of his official position. In effect the same allegations are repeated in the brief at pages 54, 55, 74, 75, 109, 110, 118. These statements are wholly false, except perhaps the statement that the petitioners then had no knowledge of the contract, for in fact they were not then claimants to the estate. The contract was made June 30, 1936. It was approved, as required by law in such instances, by the County Court of Muskogee County, Oklahoma, which court had jurisdiction of the settlement of the estate of Jackson Barnett, March 8, 1937, and was approved by the Secretary of the Interior September 2, 1937. The trial commenced March 23, 1937. The petitioner Dora Brady intervened in the action July 12, 1937. Lucinda Watashe intervened February 11, 1937.

That the petition and brief tend to mislead rather than enlighten is abundantly witnessed: For instance, by the claim that no notice of the proceedings relating to the contract was given petitioners, when in fact they were not claimants. There was no "concurrence" of the trial judge in the matter of the contract. There was no solicitation by respondents for the aid of the United States Attorney's office in the matter of the approval of the contract. The action in the office of the United States District Attorney was merely in furtherance of proper discharge of duties in the case of restricted Indians, for whom the United States had appeared as a litigant in the case.

There are various other material mis-statements of fact, hereinafter cited at appropriate places.

The Charges of Bias and Prejudice Upon the Part of the Trial Judge, and the Alleged Failure of the Court to Grant a Fair Trial.

These charges rest upon two false assumptions, to-wit: *(1)* It is erroneously assumed that the appearance of the United States upon behalf of restricted Indians was wrongful, and that this appearance by the United States improperly influenced the trial judge in favor of the parties to the settlement agreement, against all other claimants, and *(2)* It is further erroneously assumed that said agreement is against public policy, and that on account of the family contract the trial judge was biased in favor of the parties to the contract and prejudiced against all other claimants.

The record shows that the United States appeared impartially upon behalf of all the restricted Indians until the government was fully advised as to the true facts relating to the heirship, and until many depositions had been taken. It was then that the Assistant United States Attorney, in the course of his ordinary duty, recommended the approval of the family settlement agreement.

The Circumstances in Which the Matters Complained About Arose.

A large fortune was involved. The case was widely advertised. There were more than forty groups of claimants, each asserting title to the whole of the estate. The claimants numbered nearly one thousand. They were widely scattered, all the way from California to eastern parts of Tennessee and Kentucky. Many of the claims were manifestly wholly fabricated. From the first of the trial, and throughout, perjury as to many of the claims abounded beyond any precedent known to us. And there was much subornation of perjury. From time to time witnesses returned to the

stand to retract their former false evidence. Some of the lawyers participating in the case were provokingly uninformed with respect to the history of the matters under consideration and with respect to the laws governing the Creek Tribe of Indians, to which Jackson Barnett belonged. After repeated warnings some of the attorneys, including counsel for petitioners, persisted in leading their witnesses at the vital points. Often disrespect for the court was shown. There were frequent unfounded and bitter attacks upon high placed and honorable representatives of the United States. There was abundant evidence of gross frauds by various claimants to procure and corrupt their witnesses. The record as to the losing claimants, though not all bad, considered as a whole was so intolerable that the trial judge was provoked beyond quiet endurance.

The Trial Judge.

It is a matter of common knowledge that the trial judge has had a long, honorable and useful career in the State of Oklahoma. He was first Chief Justice of the state, then its Governor for four years. Thereafter for many years he was United States District Judge for the Eastern District of Oklahoma, and was then elevated to the Circuit Court of Appeals for the Tenth Circuit. Now in retirement, he was assigned to preside at the trial of this case. He often participates in the work of the Circuit Court. Repeatedly he has been referred to in the decisions of the Circuit Court of Appeals for the Tenth Circuit as experienced and very able in Indian matters of this sort. Probably he was assigned to this case because of his vast experience and ability in such matters. It seems that in effect he is charged with dishonesty. We respectfully submit that these charges are intolerable.

(We find ourselves unable to follow the order of petitioners' brief. Respondents' brief, which follows, is intended to further show that the petitioners had a fair trial, free from bias or prejudice upon the part of the trial judge. In the brief we discuss incidentally the family settlement agreement and the proceedings with respect thereto.)

The petitioners had a fair and impartial trial, free from bias or prejudice upon the part of the trial judge.

(1) ***Petitioners erroneously assume and charge that the appearance of the United States, together with the acts of its officers during the course of the trial, was wrongful and unauthorized by law, and that this improperly influenced the trial judge in favor of the respondents and against all other claimants.***

The United States had the capacity to prosecute this suit upon behalf of restricted Indians, to conserve their restricted property, and to assist in placing the same in the hands of the true owners. Its representation is neither incomplete nor inadequate to fully protect the real owners of the property. There can be no more complete representation than that on the part of the United States whilst acting on behalf of its dependents. This authority of the Government does not rest upon any convention, nor is it circumscribed by any rules which govern private relations. The source of the Government's representation in such cases is traced to the plenary power of Congress in legislating for the protection of the Indian wards of the Government. Neither the Government nor the courts recognize any limitations upon the Government's authority inconsistent with its full discharge of the national duty to the wards of the United States. The presence on the same side with the Government of other parties neither adds to nor detracts from the power of the government whenever the govern-

ment chooses to exercise its powers in such case. The restricted Indians themselves cannot successfully assume any attitude with respect to their restricted properties which would hinder the United States in its complete representation of the restricted Indians. The question as to whether or not the United States will exercise its vast powers in Indian matters is left, under the acts of Congress, to the discretion of the Executive Department, particularly the Secretary of the Interior, at whose instance the United States appeared in this case. The government, through its proper agencies, determines for itself, where restricted Indians are involved who war among themselves as to the ownership of the property, whether or not to appear in its representative capacity, and if appearing, whose cause the United States will espouse.

—*Heckman* v. *United States*, 224 U. S. 431, 56 L. ed. 820;

United States v. *Mid-Continent Petroleum Corp.* (10th Cir.), 67 F. (2d) 37;

Caesar v. *Burgess*, (10th Cir.), 103 F. (2d) 503.

See also the following cases, involving either parts or all of the properties of the Jackson Barnett, deceased, whose estate is here involved:

Barnett v. *United States* (9th Cir.), 82 F. (2d) 765;

United States v. *Mott* (10th Cir.), 37 F. (2d) 860;

United States v. *Mott* (D. C.), 33 F. (2d) 340;

Barnett v. *Equitable Trust Co.* (2nd Cir.), 34 F. (2d) 916, 918;

Barnett v. *Equitable Trust Co.*, 21 F. (2d) 325;

United States v. *Equitable Trust Co.*, 283 U. S. 738, 75 L. ed. 1379.

—Act of May 27, 1908 (35 Stat. 312);
Act of April 12, 1926 (44 St. L. 239);
Act of January 27, 1933 (47 St. L. 777).

The United States statutes above cited authorize the appearance of the United States and its representation of restricted Indians in the manner in which the government here appeared.

The power of the Government to represent restricted Indians and to preserve their properties necessarily carries with it the power of determination of the question as to which of the contending parties is entitled to the support of the Government. And when the Government, by its proper representatives, has so determined which of the claimants are entitled to the support of the United States, it necessarily follows that the Government has the right to sue upon behalf of those wards who are accepted by the Government as the true owners of the property in dispute.

Petitioners go entirely too far when they say that the trial judge was improperly influenced in his findings of fact, conclusions of law, and decree, by what the United States did in the ordinary course of proper exercise of its powers and duties in the representation of restricted Indians.

Likewise, they go too far and altogether beyond the bounds of propriety by proclaiming that the trial judge was unduly influenced in his judicial decision by the acts of the governmental agencies with respect to the approval of the Family Settlement Agreement. These governmental agencies for the purpose of the approval were the Secretary of the Interior, the Solicitor in his office, the Attorney General of the United States, the United States Attorney for the Eastern District of Oklahoma, the Superintendent for the Five Civilized Tribes, the County Court of Muskogee County, Oklahoma, which has jurisdiction of the settlement of

the estate of Jackson Barnett, deceased, subject, of course, to the right of this Court to determine the heirship, and the various other County Courts of Oklahoma which aproved the contract in the cases of the widely scattered minors and incompetents.

Petitioners who charge bias and prejudice upon the part of the trial judge erroneously contend that the United States is a mere ordinary interpleader, and say that it was incumbent upon the Government throughout the trial to remain disinterested and impartial.

Petitioners' theory as to what constitutes the alleged bias and prejudice is found in the following excerpt from their brief presented in the Circuit Court of Appeals and here filed as part of their Appendix, Vol. I:

> "Having so interpleaded herein for and on behalf of the United States as the guardian for all the restricted Indians, who claim to be heirs of the said decedent, Jackson Barnett, and for the protection of the rights of all such restricted Indian claimants in and to said estate of the decedent, which was held and controlled in the Interior Department of the United States, and the rights of the United States as the custodian of said property for the use and benefit of such restricted Indian claimants as the court might adjudge to be said heir, it follows that the said Assistant United States Attorney was without the right or authority to participate in negotiating, executing and presenting the so-called 'compromise agreement' or 'family settlement' in behalf of a part of the said restricted Indian claimants and to the prejudice of other restricted Indian claimants, and that the said Assistant United States Attorney had no right or authority to thereafter prepare and present to the court for approval findings of fact and conclusions of law in favor of said groups.
>
> * * * * * * *

"The court should hold in mind that *this is the culminating and deadly act of the attorneys for the United States, done in the name of the United States, and guardian and interpleader for the appellants, Dora Brady, et al.*, restricted Indian claimants herein, as well as for other restricted Indian claimants. *Frankly, it was a judicial stab in the back and was inflicted without notice,* as no copy of said requested findings of fact and conclusions of law were served on appellants, and appellants had no knowledge of the said requested findings and conclusions until the record herein on appeal was being prepared." (Italics ours.)

(2) *The Family Settlement Agreement is valid and did not tend to prejudice the trial court.*

The instrument provides *(1)* that each group should continue to prosecute its claim at its own expense; *(2)* that the three groups should share the expense of defending against all the other claimants; and *(3)* in the event the members of either group should be adjudged to be the heirs of Jackson Barnett, then the persons comprising the three groups should share the estate in the proportions specified in the contract.

A correct statement of the provisions of the contract, the contentions of the parties as to its meaning and effect, its manner of performance, and the court's findings and conclusions with respect thereto, are shown in the court's findings of fact and conclusions of law entered January 2, 1940 (Clk. Tr. Vol. 2, pp. 1132, 1171).

The approval of the instrument by the Secretary of the Interior is as follows:

"DEPARTMENT OF THE INTERIOR.
Office of the Secretary.
Sep-2, 1937.

"The foregoing agreement as of June 30, 1936, by and between certain persons (Seaborn Fisher, Nettie Conner Bear, Eliza Gouge, and other persons) composing three groups of claimants as heirs to the estate of Jackson Barnett, Creek Indian, roll No. 4254, deceased, is hereby approved without prejudice to the right of any claimant and subject to the condition that all the evidence available to the parties to the agreement shall be fully and fairly presented to the Federal Court and subject to the further condition that such approval shall not be construed as qualifying, removing or impairing in any way whatsoever the existing restrictions and jurisdiction of the Secretary of the Interior over any property belonging to the estate of Jackson Barnett, deceased. This approval shall not be construed as a recognition by the Department that the parties to the agreement, or any of them, are in fact the rightful heirs of Jackson Barnett."

(Signed by the Acting Secretary of the Interior.)

This instrument is Conner's Exhibit No. 73.

Only parties to a settlement agreement may avoid it by suit. Petitioners are strangers to the agreement and therefore have no standing in court to impeach its validity.

—C. J. S. p. 749, par. 30;

Hall Lumber Co. v. *Gustin* (Mich.), 20 N. W. 616, 619.

Compromises are favored by the courts; and the most favored of all compromises are contracts of family settlement.

—18 C. J. 887, Sec. 157;

18 C. J. 888, Sec. 158;

12 C. J. p. 322;

Pomeroy's Equity Jurisprudence, Third Edition, Vol. 2, p. 1500, par. 850;

Sango v. *Parks*, 44 Okl. 223, 143 Pac. 1158;

Kiefer Oil & Gas Co. v. *McDougal* (8th Cir.), 229 Fed. 934;

Williams v. *First Nat. Bank*, 216 U. S. 582, 44 L. ed. 625;

5 R. C. L. 880, "Compromise and Settlement";

Vinson v. *Cook*, 76 Okl. 46, 184 Pac. 97;

Burnes v. *Burnes*, 137 Fed. 781.

One claiming to be an heir may sell, assign and transfer his interest in an estate during or prior to administration and before a decree of distribution is rendered, and his assignee or grantee will "step into his shoes", and if the assignor or grantor is adjudged to be an heir, the assignee or grantee will receive distribution in his stead.

(This point is to meet the contention that as to some of the contracting parties the approved agreement effected the transfer of interest.)

—Sec. 1366, Okla. Stat. 1931;

18 C. J. 898;

24 C. J. 930;

Lusk v. *Green*, 114 Okl. 113, 245 Pac. 636;

Purdue v. *Purdue*, 81 S. W. 633;

Sloan v. *Moffatt*, 41 Iowa 271;

Sieve v. *Steinridge*, 1 S. W. 672;

Branch v. *Hanrick*, 70 Tex. 731, 8 S. W. 539.

The parties to the Family Settlement Agreement became, as of the date of their contract, June 30, 1936, and long before the commencement of the trial, owners in common of all the right, title and interest of the contracting

parties in and to the estate here involved. They could then, as such owners in common, do anything for the protection of the common title which the courts ordinarily permit owners in common to do. The contract did not require that any party thereto should do or refrain from doing anything out of ordinary and lawful course when a common title is attacked. The approval related back to date of settlement.

—*Anchor Oil Co.* v. *Gray*, 256 U. S. 519, 65 L. ed. 1070;

United States v. *Getzelman*, 89 F. (2d) 531.

The contract was a conveyance by the members of each group to the members of each of the other two groups, of all such right, title and interest as was held by such members in and to the Jackson Barnett estate, as was necessary to vest in each of the groups, and in the members thereof, the proportionate parts of said interest in the estate provided for in said contract.

By various Acts of Congress the allotment of Jackson Barnett is restricted against alienation, and the royalties accrued therefrom, which are held by the Secretary of the Interior, under his supervision and control, are likewise restricted. It was therefore necessary that the Secretary of the Interior and the several county courts of Oklahoma which approved the contract, should approve the instrument. The authority to remove restrictions of this character is a necessary complement of the government's power to impose them. The representation in such matters by the United States, acting through its designated authorities, is complete and exclusive. From every duty assumed by the federal government in dealing with its Indian wards there arises, even without express statutory authority, the duty of protecting its wards, and this protection necessarily goes with the governmental power. There is, however, ample ex-

press statutory authority for what was done in the instant case.

The Act of Congress of May 27, 1908 (35 Stat. 312), covers the points here discussed, particularly at sections 1, 2, 3, 6, 9 and 11. Said Act of May 27, 1908, was amended in important respects by the Act of April 12, 1926 (44 St. L. 239). In the amendment it is provided that any party to a suit where restricted Indians or their heirs are involved, may bring the United States into the suit as a party thereto, as was done in this case.

The Act of Congress of January 27, 1933 (47 St. L. 777), provides, amongst other things, that all funds and securities then held by or which might thereafter come under the supervision of the Secretary of the Interior, belonging to restricted Indians, should remain subject to the jurisdiction of the Secretary until April 26, 1956.

In these cited Acts of Congress full and precise authority is given to the government, acting through its designated approval agencies, to do that which was done in the matter of the approval of the Family Settlement Agreement.

This executive power exercised in Indian matters, has been always deemed a political one, not subject to be controlled by the judicial department of the government.

> —*Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 306.

The doctrine of *Heckman* v. *U. S.*, *supra*, 224 U. S. 413, 56 L. ed. 820, and the authorities there cited show that there was no policy involved in the matter of the making of said contract other than the policy of the United States Government with respect to its Indian wards, which does not permit any other authority whatsoever to operate within the field for the exercise of the government's policy toward its

wards. The whole matter of governmental guardianship of Indians lies within a special field well defined from time to time by Acts of Congress, and in this field the Secretary of the Interior is supreme, unless Congress provides otherwise. When the Secretary of the Interior decides a matter of this sort, in the absence of fraud, gross mistake of fact, or error of law (there are no such elements here involved), his decisions have complete finality. He, and he alone, passes judgment upon all matters of propriety—upon the questions as to whether or not a transaction is for the best interest of the restricted Indians involved, as to whether or not the consideration is ample, and as to whether or not the contract is subject to any unreasonable conditions. And when the Secretary decides, all questions of governmental policy towards Indian wards are forever determined, for the Secretary of the Interior has passed upon and adjudged the matter of policy. There is ample authority supporting this view, such as the case of *Lykins* v. *McGrath*, 184 U. S. 169, 46 L. ed. 483.

In *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 306, an opinion by the learned Justice WHITE, it was said:

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

The thing called "governmental guardianship of restricted Indians" of course is not a guardianship within the ordinary meaning of the word. It means the policy of the United States in Indian matters, fixed always by Congress and exercised through the executive branch of the government, ordinarily by the Secretary of the Interior.

The voluminous argument about public policy is entire-

ly beside the point. However, there is nothing in the public policy of the State of Oklahoma contrary to that which was done here. The attack which the petitioners make upon this contract really comes to this: They say, in effect, that representatives of the government erred in the exercise of their powers—in their efforts to protect these full-blood Indians in their property rights; in other words, that the policy followed by these governmental officials was wrong. That policy lies upon a plane beyond the power of attack by the petitioners.

Petitioners erroneously overlook the rule that there is no question of policy involved with respect to the contract, other than the policy of the United States in the exercise of its exclusive governmental guardianship over these restricted Indians. They erroneously overlook the fact that all of the parties to the contract became owners in common of whatever interest the contracting parties had in the estate as of June 30, 1936, the date of the contract, and they erroneously and falsely assume that the contract contains provisions which owners in common could not make legally in the then circumstances. There are no provisions in the contract beyond the legal power of owners in common to provide by stipulation, for the protection of the common title.

The authorities cited by petitioners in support of their contention that the settlement agreement is against public policy are not in point—they are wholly inapplicable. There is nothing in the contract which even tends to invite suppression of evidence. There is nothing which contemplates or suggests the use of unlawful means. None of the cases cited by petitioners against the validity of the contract are in point. In each of the cases relied upon by petitioners the particular contract involved was sought to be enforced by a party thereto who was seeking to secure some benefit

under the contract. In each case the particular contract was secret; its existence was unknown to parties who might have been adversely affected by it. The particular contract involved in each case was the basis of the suit, and the defense of illegality was made by one of the parties thereto—a direct attack upon the contract by a party to it.

The evidence as to the manner in which the respondents performed their respective duties under the agreement is all to the effect that supression of evidence was never contemplated; that in fact all parties to the contract offered all available evidence, as required by the order of approval by the Secretary of the Interior. See testimony of Judge D. A. Richardson, Tr., pp. 8599, *et seq.*, and of N. A. Gibson, Tr. pp. 8603, *et seq.*

The findings of the trial court with respect to how the contract was performed were approved by the Circuit Court of Appeals in its decision in *Scott* v. *Beams,* 122 F. (2d) 777. See page 783 of the Circuit Court's opinion. In Vol. III of respondents' brief presented in the Circuit Court of Appeals this contract and all the contentions of the parties relating thereto are discussed fully commencing at page 218.

(3) ***Petitioners are foreclosed upon their claims of heirship by the tribal or town rolls of the Creek Nation, and by the final citizenship rolls made by the Commission to the Five Civilized Tribes, commonly known as the Dawes Commission.***

The findings of the Commission are conclusive upon all questions which relate to the right of enrolment and allotment of lands. The findings of the Commission, which appear upon the final enrollment records as descriptive of enrolled Creek citizens, such as the tribal town to which the citizen belonged, parentage, sex, and the like, are at least prima facie evidence of the facts found, and these findings are entitled to such great weight that they cannot be overcome, in the absence of clear, unambiguous and convincing countervailing evidence clearly establishing error or mistake.

—*U. S.* v. *Wildcat*, 244 U. S. 111, 61 L. ed. 1024;
Folk v. *United States* (8th Cir.), 233 Fed. 177;
United States v. *Mid-Continent Petroleum Corp.* (10th Cir.), 67 F. (2d) 37;
Halsell v. *Beartail*, 107 Okl. 103, 227 Pac. 392;
Cox v. *Colbert*, 135 Okl. 218, 275 Pac. 317.

Many other authorities are to the same effect.

The Creek tribe was a dependent nation which had the right of occupancy of the lands set aside to the tribe by the government. The nation maintained its separate government. The chief executive was the Principal Chief. The legislative body consisted of the House of Kings, somewhat like a State Senate, and the House of Warriors, patterned after a House of State Representatives. The members of the nation were divided into towns, usually forty-seven in number. These towns were constituted of groups who resided mainly in somewhat separate communities where their social life and political affairs centered. But the members of a given town were scattered, more or less,

throughout the whole nation. Each town elected its own Town King, who thereby became a member of the upper branch of the law-making body. The Town King made and had the custody of the roll of membership of the town. As members of the town died their names were stricken, and as new members were born their names were added to the tribal town roll. Government payments were made from time to time to the members of each town, the payments being based upon the town rolls. Usually the payments were made direct to the Town Kings, who in turn disbursed the payments to the members of the town whose names appeared on the town rolls. The final rolls were made by the Dawes Commission by authority of the Congress in course of winding up the affairs of the Nation and the allotment of the lands of the Nation to the citizens of the tribe.

In *United States* v. *Wildcat, supra,* this Court said:

> "* * * By the Act of Congress of June 10, 1896 (20 Stat. at L. 339, Chap. 398), the Commission to the Five Civilized Tribes, more commonly known as the Dawes Commission, was authorized to hear and determine applications for citizenship in any of the Five Civilized Tribes. By that act the rolls of citizenship of those tribes as they then existed were confirmed and the Commission commanded in determining applications for citizenship to 'give due force and effect to the rolls, usages, and customs of each of said nations or tribes.' It was provided by the Act of June 7, 1897 (30 Stat. at L. 84, chap. 3), that the term 'rolls of citizenship' should mean 'the last authenticated rolls of each tribe which have been approved by the council of the nations, and the descendants of those appearing on such rolls', and certain others specified who had been lawfully added to the rolls. By the Curtis Act of June 28, 1898 (30 Stat. at L. 495, 502, chap. 517), the Commission was authorized and directed to make correct rolls of the citizens by blood of the Creek Tribe,

eliminating from the tribal rolls such names as might have been placed thereon by fraud or without authority of law, enrolling such only as might have lawful right thereto, and their descendants born since such rolls were made. It was provided that the Commission should make such rolls descriptive of the persons thereon, so that they might be identified thereby, and the Commission was authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls, with the right of access to all rolls and records of the several tribes, and with authority to administer oaths, examine witnesses, and send for persons and papers. The rolls so made, when approved by the Secretary of the Interior, were to be final, and the persons whose names were found thereon, with their descendants thereafter born to them, with such persons as might intermarry according to tribal laws, were alone to constitute the several tribes which they represented. By Sec. 28 of the Creek Agreement of March 1, 1901 (31 Stat. at L. 861, 870, chap. 676), it was provided that all citizens who were living on the 1st day of April, 1899, entitled to be enrolled under the above provisions of the Curtis Act, should be placed upon the rolls to be made by the Dawes Commission under that act, and provision was made for allotment to the heirs where any such citizen had died since that time. 'The rolls so made by said Commission', the act continues, 'when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons.' This agreement was ratified by the Creek Council June 25, 1901 (32 Stat. at L. 1971).

"The legislation which we have outlined indicates the purpose of Congress to make provision for the partition of the lands belonging to the Creek Nation among the members of the tribe, and to that end it authorized the Dawes Commission to make investigation

> and determine the names of such as were entitled to be on the rolls of citizenship and to participate in the division of the tribal lands. This purpose, indicated in the Curtis Act of 1898, was emphasized by the so-called Creek Agreement of 1901, subsequently ratified by the tribe. In that act the Commission was authorized to investigate the subject, and its action, when approved by the Secretary of the Interior, was declared to be final. There was thus constituted a quasi judicial tribunal whose judgments within the limits of its jurisdiction were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress, by this legislation, evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the partition of the tribal lands. It was to the interest of all concerned that the beneficiaries of this division should be ascertained. To this end the Commission was established and endowed with authority to hear and determine the matter.'

The Creek tribal town rolls of 1890 and 1895 were made the basis for final enrolment. As to this, in *Folk* v. *United States, supra*, it was said:

> "The Creek Tribe made the Creek rolls of 1890 and 1895. By the Creek Agreement (31 Stat. 869, Sec. 28), which it made and ratified, the Creek Tribe contracted with the United States that the Dawes Commission should make the final roll of its citizens and allot them their lands, and that it should base that enrollment on the Creek tribal rolls of 1890 and 1895, and especially upon the latter."

In the course of determining whose name should appear upon the final citizenship rolls, the Dawes Commission made satisfactory investigation and heard evidence as to

(Brad

Residence:.....

Post Office: Bristow, Ind. Ter.

CREEK NATION. CREEK ROLL.

Dawes' Roll No.	Name	Relationship to Person First named.	AGE	SEX	TRIBAL ENROLLMENT				TRIBAL ENR		
					BLOOD	Year		No.	Name Of Father	Year	
5475	1. Brady, Albert		24	M	Full	1890	Hickory Ground	Page 123	Jackson Barnett	Dead	Hick Gro
5476	2. Brady, Dora	Dau	4 mos.	F	½		Hickory Ground		No. 1		Hick Gro

No. 1 on 1890 Roll as
No. 1 also on Hickory
1895.

Citiz'p Certif. issued March 6th, 1900

for Nos. 1 and 2 (N. B. for No. 2 No. 93)

(Brady's Exhibit No. 5.)

Card No. 1701

Field No. 1705

CREEK NATION. CREEK ROLL.

SEX	TRIBAL ENROLLMENT				TRIBAL ENROLLMENT OF PARENT					
	BLOOD	Year		No.	Name Of Father	Year		Name Of Mother	Year	
M	Full	1890	Hickory Ground	Page 123	Jackson Barnett	Dead	Hickory Ground	Sinda Sewell	1890	Hickory Ground
F	½		Hickory Ground		No. 1		Hickory Ground	Mary Brady		U. S. Citizen

No. 1 on 1890 Roll as Albert Soele
No. 1 also on Hickory Ground Town Census Roll of 1895.

(N. B. for No. 2 No. 93)

March 6th, 1900

Residence: Bryant

Post Office: ~~Seneca~~, Ind. Ter.

CREEK NATION. INDIAN ROLL

REEK NATION. INDIAN ROLL

Card No. 1419

Field No. 1423

Dawes' Roll No.		NAME	Relationship to Person first Named	AGE	SEX	BLOOD	TRIBAL ENROLLMENT Year	Town	~~No.~~ Page	Name of F
4524	1	Barnett, Jackson		48	M	Full	1890	Tuckabatchie	235	Siah Ba
	2									
	3									
	4									
	5									
	6									
	7							No. 1 on Tuckabatchee Pay R		
	8									
	9							ENROLLMENT		
	10							OF NOS.....4524.....HEREON		
	11							APPROVED BY THE SECRETARY OF INTERIOR		
	12							March 13, 1902		
	13	Citiz'p Cert.								
	14	issued	For No. 1 L							
	15	Jun 28 1902								
	16									
	17									
	18									

TRIBAL ENROLLMENT Year	Town	~~No.~~ Page	TRIBAL ENROLLMENT OF PARENTS Name of Father	Year	Town	Name of Mother	Year	Town
1890	Tuckabatchie	235	Siah Barnett	Dead	Tuckabatchee	Thlesothle	Dead	Tuckabatchee
			No. 1 on Tuckabatchee Pay Roll of 1895					
			ENROLLMENT					
			OF NOS.....4524.....HEREON					
			APPROVED BY THE SECRETARY OF INTERIOR					
			March 13, 1902					

Form No. A. 185

Jan'y 24th 1900

each person, not only as to the right to be enrolled, but as to description of every one of them, and in case of doubt sent out special investigators, known as field parties, to search for evidence to identify each person, and determine matters of description. See the testimony of Wm. O. Beall (Tr., p. 8372, *et seq.)*. The Town Kings and head men of each town testified before the Commission.

In the performance of its duties the Commission prepared the final enrolment record of the Jackson Barnett whose estate is here in controversy, and the final roll of Albert Brady, father of the petitioners Dora Brady and Lucinda Watashe, both of which rolls are here inserted opposite this page. It clearly appears from an examination of these records that the Jackson or Jackson Barnett through whom petitioners claim was a member of Hickory Ground Town and died before final enrolment, and that the true Jackson Barnett whose estate is here involved was a member of the Tuckabatchee Town and lived until 1934

Petitioners contend that the evidence shows there was no Jackson Barnett on the Hickory Ground Town roll. It is true that the full name Jackson Barnett did not appear on either the 1890 or 1895 roll of Hickory Ground, but it is shown that the name "Jackson" was there. Many Creek Indians had no family name and appeared on the town rolls without family name. For illustration, the true Jackson Barnett through whom respondents claim is enrolled as "Jackson" on the Tuckabatchee Town rolls until the roll of 1882, where his name appears as "Jack Barnett". That this custom was followed very generally in making the town rolls appears from the town rolls here introduced. This custom gives special force to the enrolment of a citizen as a member of a particular town. In this case the enrolment of the Jackson Barnett, through whom respond-

ents claim, as a member of the Tuckabatchee town, distinguishes him from other Jackson Barnetts who belonged to other towns.

In *United States* v. *Mid-Continent Petroleum Corporation, supra,* it was said:

> "Official records or documents kept or prepared by a person whose public duty it is to truly record the facts stated therein, are admissible as prima facie evidence of such facts. *Evanston* v. *Gunn,* 99 U. S. 660, 666, 25 L. ed. 306; *Runkle* v. *United States* (C. C. A. 10), 42 F. (2d) 804; *McInerney* v. *United States* (C. C. A.), 143 F. 729, 737; Wigmore on Evidence (2d Ed.), Vol. 3, Sec. 1639. The enrollment records made by the Dawes Commission were such records. They were made by members of a quasi-judicial tribunal created by Congress, whose duty it was to determine and truly record the facts therein set forth, and even as to collateral and incidental matters they are prima facie evidence of the facts stated therein. *Page* v. *Atkins,* 86 Okl. 290, 208 P. 807, 818; *Halsell* v. *Beartail,* 107 Okl. 103, 227 P. 392, Note 5.
>
> "The tribal rolls were also admissible. They were made by an officer of the Creek Nation whose duty it was to truly record the facts stated therein; and they are prima facie evidence of such facts. *Evanston* v. *Gunn, supra; Fowler* v. *Scott,* 64 Wis. 509, 25 N. W. 716; *Newman* v. *Doe,* 4 How. (Miss.) 522, 554, 555."

The parol evidence upon behalf of respondents abundantly supports the rolls. John A. Jacobs, who was called as a witness by parties other than respondents, testified (Tr., p. 2672) that he was Town King of the Tuckabatchee Town and a member of the House of Kings; that he was well acquainted with Jackson Barnett whose estate is involved in this controversy; that Jackson Barnett was a member of Tuckabatchee Town; that the witness helped

prepare the rolls for Tuckabatchee Town in connection with both the 1890 and the 1895 payments (Tr., p. 2674); that in preparing the rolls for the 1890 payment, he did the clerical work for George Alexander, who was Town King, and the work was done at Josh Asbury's; that the Town King of each town in the Creek Nation had charge of preparing the roll for his town; that in 1895 he had charge of preparing the roll by himself; that this roll was prepared at Jim Barnett's store; that Jim Barnett was a half-uncle of Jackson Barnett; that the roll prepared in connection with the 1895 payment was prepared by this witness from information furnished by the various members of Tuckabatchee Town, who were assembled at Jim Barnett's store on that occasion; that he placed Jackson Barnett's name on the roll himself, and that this witness saw Jim Barnett sign for Jackson Barnett on the 1895 roll as the uncle of Jackson Barnett (Tr., p. 2678).

(4) ***The manifestly false and absurd claims of petitioners, the improper methods by which the claims were presented, counsel's disregard of the enrolment records, the introduction of much wholly incredible oral evidence, together with other provoking circumstances, brought about the statements from the trial judge which are here criticised.***

Counsel for petitioners confuse the evidence introduced at the trial with the evidence heard after the trial when the affiants supporting the motion for new trial were cross-examined upon the subject-matter of their affidavits, and erroneously contend that the court exceeded its authority whilst passing upon the sufficiency of the affidavits to disqualify the judge. Amongst the witnesses cross-examined upon their said affidavits were the following:

The petitioner Dora Brady was questioned with re-

spect to the connection of Sim Liles with the case. The questions directed to her were solely for the purpose of testing her credibility as an affiant.

The affiant Sim Liles, who is not a lawyer, had charge of the litigation upon behalf of these petitioners. Inquiry was made of him to learn his interest in the outcome of the suit, and to ascertain what his course of conduct had been. He admitted that he was not a lawyer; that he had a percentage contract by which he is to receive part of the property if these petitioners win (Tr., p. 8631). He admitted that one Davis who helped to finance this group in the litigation likewise is to be one of the beneficiaries of the judgment, under a percentage contract, in the event this group wins. He admitted in effect that he had been at all times the promoter of the case; that he had advertised for Dora Brady and found her in the State of Nevada, and brought her to Sapulpa, Oklahoma, and had installed and kept her in his own home, and that she was still there—just the two of them—though Liles all the time had a wife who had withdrawn from the home and lived alone. His examination upon his affidavit in support of the petitioners' motion for new trial was in part as follows (Tr., pp. 8638, *et seq.):*

Q. "Do you pay Dora a salary there?

A. I give her room rent and furnish her her eats.

Q. You have been in charge of this litigation on the outside from the first, have you not?

A. I think so."

The appearance of Liles and his activity throughout the trial were so objectionable to the trial court as to cause some of the criticism to which objection is made.

R. C. Mason was another of the affiants who supported the motion for new trial by his affidavit. Commencing

at page 93 of their brief petitioners vigorously deny the right of the trial court to impugn the motives of Mason. The direct testimony of the affiant R. C. Mason, which was put on by counsel for this group at the hearing of the motion for new trial, is found in the record commencing at page 8675. His cross-examination commences at page 8687. Here it is shown that this affiant actively aided in procuring the affidavits supporting the Motion for New Trial. He admitted that he was a long time violator of the prohibition laws of the State of Kansas, and that he there corrupted and bribed officials to prevent the discharge of their duties; that he had pleaded guilty and was convicted in Kansas for corrupting and bribing public officers. He admitted other wrong-doings of serious nature, all shown upon his cross-examination.

Micco Behen, one of the affiants supporting this motion for new trial, admitted that he had been convicted and served a term in the penitentiary for theft.

The record shows unmistakably that Jackson Barnett was a near idiot and without sufficient intelligence to contract marriage. The District Court for the Southern District of California so held in *United States* v. *Barnett, et al.,* which decision was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, in the case of *Barnett* v. *United States,* 82 F. (2d) 765. Several other cases above cited, involving the estate of Jackson Barnett, are to the same effect. Many witnesses testified to the fact of Jackson Barnett's incompetency. Amongst them are the following:

John A. Jacobs (Tr., p. 2669, at p. 2680);
Lizzie Wyman (Tr., p. 2813, at p. 2828);
Mary Fields (Tr., pp. 2836, 2837, 2838);
Wm. McQueen (Tr., p. 3656, at p. 3858);

Eliza Grayson (Tr., p. 2852, at p. 2855);
Annie Beam (Tr., p. 3693, at p. 3696);
Wm. Fisher (Tr., p. 3718, at p. 3723);
Robert Bell (Tr., p. 4385, at p. 4392);
Timmie Randall (Tr., p. 5522);
Dr. W. C. Sanderson (Tr., p. 3687, at p. 3690);
George Riley Hall (Tr., p. 3981);
Ben Marshall (Tr., p. 1444).

Jackson Barnett had been known from his boyhood as "Crazy Jack". Notwithstanding the fact that he had been known as "Crazy Jack", notwithstanding the courts' decisions upon the question, and the weight of evidence here overwhelmingly showing that he had the well known characteristics of a crazy man, witnesses upon behalf of these petitioners testified in effect that he was an Indian of ordinary intelligence. Many of petitioners' witnesses testified to alleged conversations with Jackson Barnett of which he was wholly incapable, for want of enough intelligence to say the things attributed to him.

See the testimony of Wade Kilcrease (Tr., pp. 4744-4763). This witness was eager to testify to a marriage between Cinda and Jackson Barnett, but the Jackson Barnett who was Cinda's husband talked about everything in general, argued the scripture, discussed the preacher's sermon, methods of agriculture, farmed some, talked Creek as well as the witness, and was an intelligent Indian (Tr., p. 4759). This Jackson the witness had heard called Charles or Charley Barnett as often as he had heard him called Jackson Barnett (Tr., p. 4760). This Jackson firmly believed in baptism and not sprinkling. He testified at camp meetings what the Lord had done for him, and often, when the preacher failed to come, would fill the pulpit for him (Tr., pp. 4762-63).

Jackson Barnett's Town King testified to the crazy actions of Jackson Barnett and described him as having gone to a dance where he stood under a tree for two days, separate and apart from anybody, speaking to no one. When he was addressed by the salutation "How do you do, Jackson", his answer was "How do you do Jackson".

When the petitioners' case came on for hearing the judge was already so much disturbed by what appears to be perjury and subornation of perjury that he was thoroughly worn down and his patience exhausted. Perhaps no trial judge would have endured the situation without vigorous protest. We contend that he had a right to say everything that he did say. He had in mind the court decisions with respect to Jackson Barnett, including the California case cited *supra*, where it was affirmatively adjudged that Jackson Barnett had relatives through whom the respondents on the paternal side claim. See William Fisher's Exhibit #17, which consists of the record in the case of *Barnett* v. *United States*, 82 F. (2d) 765, upon appeal from the District Court of the United States for the Southern District of California to the Circuit Court of Appeals for the Ninth Circuit. The District Court's findings were in part as follows:

> "In the request to the Interior Department, Barnett was made to say that he had no living relatives or kindred. That statement is shown by the evidence in this case to be utterly untrue, for we have it established here that there are nephews and nieces, Creek Indians, the offspring of Jackson Barnett's brother David, all now living in Oklahoma. Jackson Barnett and David Barnett were duly enrolled through the work of the Dawes Commission which established the accredited list of the five Oklahoma tribes. No more space need be used in referring to the matter of that relationship. The enrollment list shows that both David and Jackson were

> the sons of Siah Barnett. David Barnett died a number of years ago, and the Indian Attorney Ward is also dead."

The David Barnett referred to in the above excerpt is the identical David Barnett through whom many of the respondents claim. The trial court's findings and judgment were in substance the same as the findings of the District Court of California.

We contend that it may be fairly said, as intimated by the trial court, that somebody did in fact "frame up" the pretended case of these petitioners, because the claims and the proceedings relating thereto do appear to bear all the insignia of frauds such as are too common in Indian cases. The judge was harassed by the fact that counsel for petitioners persisted in leading the witnesses upon the vital points, after the court had announced in the early stages of the trial and often thereafter that in such case counsel must not lead their witnesses upon the vital points. An examination of the record will make it entirely plain that counsel for these petitioners had his main difficulty with the court for undue persistence in leading the witnesses upon the most vital points, as in the case of the witness Robert Kelly, whose testimony is discussed here in petitioners' brief. The trial court could scarcely believe that counsel, experienced in Indian matters, could present in good faith the absurd and manifestly erroneous contentions of the petitioners. The evident complete want of any merit whatsoever in these claims should foreclose the petitioners from complaining about the trial court or the judge thereof.

The Circuit Court of Appeals, in its decision of this case, said:

> "* * * The record indicates that the attitude of certain attorneys was provocative at times, and the court was

justified in the belief that some of the testimony was fabricated. Still, we are not to be understood as approving all of the statements, comments and criticisms coming from the court, or the excess of interference with the attorneys in their examination of the witnesses. But there is no showing whatever that the complaining parties failed to introduce all of the evidence which was available to them. And we think the court reached the right conclusion in the end. Another long and expensive trial, without the incidents of which complaint is made, would in all probability conclude with like findings of fact and judgment. The ends of justice would therefore not be furthered with reasonable dispatch by ordering a retrial."

The claims of petitioners are more fully discussed in our brief filed in the United States Circuit Court of Appeals, Vol. II, commencing at pages 153 to 175.

(5) *The alleged disqualification of the trial judge.*

Upon the filing of an affidavit to disqualify the trial judge upon the ground of personal bias and prejudice, under the provisions of Sec. 21 of the Judicial Code (28 USCA, Sec. 25), it is the duty of the trial judge to pass upon the timeliness and legal sufficiency of such affidavit. If the affidavit is legally insufficient it is the duty of the trial judge to proceed.

The affidavits filed herein were not timely.

—*Swift* v. *Black Panther Oil & Gas Co.* (8th Cir.), 244 Fed. 20, 29;

Sec. 21 of the Judicial Code (28 USCA, Sec. 25);

Berger v. *U. S.*, 255 U. S. 22, 65 L. ed. 481;

Nations v. *U. S.* (8th Cir.), 14 F. (2d) 507;

Davis v. *Securities Commission* (7th Cir.), 109 F. (2d) 6;

Ex parte Amer. Steel Barrel Co., 230 U. S. 35, 57 L. ed. 1379;

Chafin v. *U. S.* (4th Cir), 5 F. (2d) 592;

Lipscomb v. *U. S.* (8th Cir.), 33 F. (2d) 33;

Bommarito v. *U. S.* (8th Cir.), 61 F (2d) 355;

Bowles v. *U. S.* (4th Cir.), 50 F. (2d) 848;

Shea v. *U. S.* (6th Cir.), 251 Fed. 433;

Duncan v. *U. S.* (9th Cir.), 48 F. (2d) 128;

Burrough of Hasbrouck v. *Agrios* (D. C.), 10 Fed. Sup. 371;

U. S. v. *Parker* (D. C.), 23 Fed. Sup. 880;

Bishop v. *U. S.* (8th Cir.), 16 F. (2d) 410.

The affidavits filed herein were insufficient as a matter of law. The alleged bias and prejudice is not of the kind or nature contemplated by the statute.

—*Benedict* v. *Seiberling* (D. C.), 17 F. (2d) 831, 836;

Berger v. *U. S.*, 255 U. S. 22, 65 L. ed. 481;

Parker v. *New England Oil Corp.* (D. C.), 13 F. (2d) 497, 498;

In re: Lisman (2d Cir.), 89 F. (2d) 898;

Ex parte Fairbank Co., 194 Fed. 978;

Anderson Coal Co. v. *Waban* (D. C.), 278 Fed. 945;

Amer. Brake Shoe & Fdry. Co. v. *Interborough Co.* (D. C.), 6 Fed. Sup. 215;

United States v. *Buck* (D. C.), 23 Fed. Sup. 508;

United States v. *Buck* (D. C.), 18 Fed. Sup. 827;

Saunders v. *Piggly Wiggly* (D. C.), 1 F. (2d) 582;

Minnesota & Ontario Paper Co. v. *Molyneaux* (8th Cir.), 70 F. (2d) 545;

Johnson v. *U. S.* (D. C.), 35 F. (2d) 355;

U. S. v. *Flegenheimer*, 14 Fed. Sup. 584.

The statements and acts of the trial judge with respect to the Family Settlement Agreement, including his conference with the Assistant United States Attorney, were in accord with strict propriety, and same do not evidence even the slightest bias or prejudice against the complaining parties.

—*Craven* v. *United States* (1st Cir.), 22 F. (2d) 605;
United States v. *Gilbert* (D. C.), 29 Fed. Sup. 507.

The certificates of counsel as to good faith were not in conformity with the statute.

—*United States* v. *Flegenheimer*, 14 Fed. Sup. 584;
Benedict v. *Seiberling*, 17 F. (2d) 831;
Saunders v. *Piggly Wiggly Corp.*, 1 F. (2d) 582;
Cuddy v. *Otis*, 33 F. (2d) 577.

It is erroneously assumed that the Family Settlement Agreement is against public policy, and that on account of the Family Contract the trial judge was biased in favor of the parties to the contract, and prejudiced against all other claimants.

—*Heckman* v. *United States*, 224 U. S. 431, 56 L. ed. 820;
United States v. *Mid-Continent Petroleum Corp.* (10th Cir.), 67 F. (2d) 37;
Caesar v. *Burgess* (10th Cir.), 103 F. (2d) 503;
Barnett v. *United States* (9th Cir.), 82 F. (2d) 765;
United States v. *Mott* (10th Cir.), 37 F. (2d) 860;
Barnett v. *Equitable Trust Co.* (2nd Cir.), 34 F. (2d) 916, 918;
Tiger v. *Western Investment Co.*, 221 U. S. 286, 55 L. ed. 738;
United States v. *Mott* (D. C.), 33 F. (2d) 340;
Barnett v. *Equitable Trust Co.*, 21 F. (2d) 325;

United States v. *Equitable Trust Co.*, 283 U. S. 738, 75 L. ed. 1379.

Perhaps the decision of the Circuit Court of Appeals in this case, reported as *Scott* v. *Beams*, 122 F. (2d) 777, 787, where the discussion of the affidavits to disqualify the presiding judge appears, is sufficient for the purposes of this answer brief.

Section 21 of the Judicial Code (28 USCA, Sec. 25) provides:

> "*Affidavit of Personal Bias or Prejudice of Judge.* Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. * * *"

It should be observed that the bias or prejudice for which a trial judge may be disqualified is *personal bias or prejudice against a party to the litigation or in favor of the opposite party to the suit.* There is not the slightest showing of any personal bias or prejudice against either of the petitioners or any other party to the suit.

In Vol. III of our brief filed in the Circuit Court of Appeals, commencing at page 177, we set forth fully all the material facts with reference to the affidavits which were offered in an effort to disqualify the trial judge, and the proceedings and rulings with respect thereto. We submit that the citations fully sustain each of our contentions.

Wherefore, Respondents most respectfully pray that the petition for writ of certiorari be dismissed or, in the alternative, denied.

Respectfully submitted,

W. T. ANGLIN,
Holdenville, Oklahoma;
ALFRED STEVENSON,
Holdenville, Oklahoma;
DICK JONES,
Oklahoma City, Oklahoma;
LEON C. PHILLIPS,
Oklahoma City, Oklahoma;
E. W. SMITH,
Henryetta, Oklahoma;
CHARLES A. MOON,
Muskogee, Oklahoma;
FRANCIS STEWART,
Muskogee, Oklahoma;
JOSEPH C. STONE,
Muskogee, Oklahoma;
Attorneys for Appellee Group I.
D. A. RICHARDSON,
First National Building,
Oklahoma City, Oklahoma;
L. O. LYTLE,
Sapulpa, Oklahoma;
GEORGE JENNINGS,
Sapulpa, Oklahoma;

HERBERT G. HOUSE,
Muskogee, Oklahoma;

ROSCOE S. CATE,
Muskogee, Oklahoma;

HARRY B. PARRIS,
Eufaula, Oklahoma;

Attorneys for Appellee Group II.

WILBUR J. HOLLEMAN,
National Bank of Tulsa Building,
Tulsa, Oklahoma;

J. GARFIELD BUELL,
Tulsa, Oklahoma;

HOWELL PARKS,
Muskogee, Oklahoma;

Attorneys for Appellee Group III.

(5)

Office - Supreme Court, U. S.
FILED
FEB 9 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

of the United States

No. 906—October Term, 1941.

ROSA ALLEN, *ET AL.*, *Petitioners*,

VERSUS

ANNIE BEAMS, *ET AL.*, *Respondents*.

ANSWER BRIEF TO THE PETITION FOR WRIT OF CERTIORARI.

W. T. ANGLIN,
ALFRED STEVENSON,
DICK JONES,
LEON C. PHILLIPS,
E. W. SMITH,
CHARLES A. MOON,
FRANCIS STEWART,
JOSEPH C. STONE,

Attorneys for Appellee Group I.

D. A. RICHARDSON,
L. O. LYTLE,
GEORGE JENNINGS,
HERBERT G. HOUSE,
ROSCOE S. CATE,
HARRY B. PARRIS,

Attorneys for Appellee Group II.

WILBUR J. HOLLEMAN,
J. GARFIELD BUELL,
HOWELL PARKS,

Attorneys for Appellee Group III.

INDEX.

PAGE

SUBJECT INDEX.

Statement 1
Nature of the claim of Rosa Allen, *et al* 2
Erroneous statements of fact in the petition 2
The controlling question of law 4

TABLE OF CASES.

Anniston Mfg. Co. v. *Davis*, 301 U. S. 337, 57 S. C. 810, 81 L. ed. 1143 4
Carter v. *Carter Coal Co.*, 298 U. S. 238, 56 S. C. 855, 80 L. ed. 1160 4
Federal Power Commission v. *Metro Edison Co.*, 304 U. S. 375, 58 S. C. 963, 82 L. ed. 1408 4
Puerto Rico v. *Shell Co.*, 302 U. S. 253, 58 S. C. 167, 82 L. ed. 235 4
Railroad Ret. Bd. v. *Alton Railroad Co.*, 295 U. S. 330, 55 S. C. 758, 79 L. ed. 1468 4
Re: 620 Church St. Bldg. Corp., 299 U. S. 24, 57 S. C. 88, 81 L. ed. 16 4
Scott v. *Beams, et al.*, 122 F. (2d) 777 ..... 1, 3

In the Supreme Court of the United States.

No. 906—October Term, 1941.

ROSA ALLEN, *ET AL., Petitioners,*

vs.

ANNIE BEAMS, *ET AL., Respondents.*

ANSWER BRIEF TO THE PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices:

Statement.

This is a companion case to that of Dora Brady, *et al.*, No. 829, October Term, 1941, Joe Tiger, *et al.*, No. 846, same term, Charles Barnett, *et al.*, No. 847, same term, and Bennie Scott, No. 850, also this same term. In our answers heretofore filed in companion cases, involving the estate of Jackson Barnett, deceased, and all arising in one case, to-wit, *Scott* v. *Beams, et al.*, 122 F. (2d) 777, we have answered most of the matters presented in the petition of Rosa Allen, *et al.* We assume that all of these will be considered together.

Nature of the Claim of Rosa Allen, et al.

These petitioners claim that Jackson Barnett, deceased, was born in Tennessee in 1842, the son of James Barnett and Margaret Condry Barnett. They say that James Barnett was killed somewhere in Missouri, and that Margaret Condry Barnett died in Tennessee. Claimants did not establish, or even attempt to establish, any connection with the Jackson Barnett whose estate is here involved, by enrolment records of members of the Five Civilized Tribes, or by any documentary proof whatsoever. The enrolment records in evidence, supported by a vast array of parol, show that Siah Barnett was the father of Jackson, and that his mother was Thlesothle. Petitioners do not so much as contend that the father of Jackson Barnett through whom they claim was Siah, nor do they attempt to show that the mother of the Jackson Barnett through whom they claim was named Thlesothle. The enrolment records and the parol prove abundantly that Thlesothle was the mother of the genuine Jackson Barnett. The claims of the Rosa Allen group are fully discussed commencing at page 78, Vol. II, of our brief in the Circuit Court of Appeals, which has been filed as an exhibit to the Dora Brady petition.

Here, as in our other answers, we do not undertake to discuss the merits of any claim, except in so far as it appears necessary to show that writ of certiorari should not be granted. If petitioners' pretended case were here upon the merits, we should contend that their mere statement makes their claim too utterly absurd for any serious consideration.

Erroneous Statements of Fact in the Petition.

These petitioners grievously err, as in the case of Joe Tiger, *et al.*, by stating, in effect, that the Honorable

United States Circuit Court of Appeals for the Tenth Circuit, in *Scott* v. *Beams, et al.*, 122 F. (2d) 777, treated the Family Settlement Agreement, entered into only by respondents, as "implementing" the record upon which the decision was rendered. In this connection we deem it sufficient to refer to our answer to the petition of Joe Tiger, *et al.* (pp. 3-7), where we have shown that the instrument referred to in the decision of the Circuit Court of Appeals was entered into by all the parties to the appeal, including these petitioners. That stipulation relates to the inter-relationship of the respondents.

It is erroneously contended by petitioners, referring to the witness Rebecca Baker, that the Family Settlement Agreement operated to suppress part of the evidence of this witness. What petitioners really mean, we suppose, is that this witness first testified by deposition, and that afterwards in open court she changed her story in part. There was no suppression. In fact her deposition was filed and published in the case for the benefit of all parties to the suit, and for any and all proper purposes, including impeachment. We contend that it cannot be said that a published deposition, which is now part of the record, has been suppressed. If the Court should desire to see all the evidence of this witness, it may be found in the Transcript of Depositions, p. 10027, *et seq.*, 13220, *et seq.*, and in the record of the trial, p. 3886, *et seq.*

Respondents' answer to the charge that they or any of them suppressed any evidence may be found at pages 15-16 of their answer to the petition of Joe Tiger, *et al.* Also please see respondents' answer to the petition of Dora Brady, *et al.*, pp. 19-26. A more extended answer appears commencing at page 257, Vol. III, of our brief in the Circuit Court of Appeals.

The Controlling Question of Law.

The petition should be dismissed, or writ should be denied, under the rule announced in the leading case of *Forsyth* v. *Hammond,* 166 U. S. 506, 41 L. ed. 1095, 1098, where it was said, with reference to the authority of this Honorable Court to issue writ of certiorari:

> "* * * it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

Apparently there has been no departure from the rule announced in the above excerpt. It seems that since the decision in *Forsyth* v. *Hammond* this Court has followed consistently the same doctrine.

—*Carter* v. *Carter Coal Co.,* 298 U. S. 238, 56 S. C. 855, 80 L. ed. 1160;

Re: 620 Church St. Bldg. Corp., 299 U. S. 24, 57 S. C. 88, 81 L. ed. 16;

Anniston Mfg. Co. v. *Davis,* 301 U. S. 337, 57 S. C. 810, 81 L. ed. 1143;

Puerto Rico v. *Shell Co.,* 302 U. S. 253, 58 S. C. 167, 82 L. ed. 235;

Railroad Ret. Bd. v. *Alton Railroad Co.,* 295 U. S. 330, 55 S. C. 758, 79 L. ed. 1468;

Federal Power Commission v. *Metro Edison Co.,* 304 U. S. 375, 58 S. C. 963, 82 L. ed. 1408.

Respectfully submitted,

W. T. ANGLIN,
Holdenville, Oklahoma;

ALFRED STEVENSON,
Holdenville, Oklahoma;

DICK JONES,
Oklahoma City,
Oklahoma;

LEON C. PHILLIPS,
Oklahoma City,
Oklahoma;

E. W. SMITH,
Henryetta, Oklahoma;

CHARLES A. MOON,
Muskogee, Oklahoma;

FRANCIS STEWART,
Muskogee, Oklahoma;

JOSEPH C. STONE,
Muskogee, Oklahoma;

Attorneys for Appellee Group I.

D. A. RICHARDSON,
First National Building,
Oklahoma City,
Oklahoma;

L. O. LYTLE,
Sapulpa, Oklahoma;

GEORGE JENNINGS,
Sapulpa, Oklahoma;

HERBERT G. HOUSE,
Muskogee, Oklahoma;

ROSCOE S. CATE,
Muskogee, Oklahoma;

HARRY B. PARRIS,
Eufaula, Oklahoma;

Attorneys for Appellee Group II.

WILBUR J. HOLLEMAN,
National Bank of Tulsa Building,
Tulsa, Oklahoma;

J. GARFIELD BUELL,
Tulsa, Oklahoma;

HOWELL PARKS,
Muskogee, Oklahoma;

Attorneys for Appellee Group III.

(1)

Office - Supreme Court, U. S.
FILED
JAN 28 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

of the United States

No. 846—October Term, 1941.

JOE H. TIGER, *ET AL., Petitioners,*

VERSUS

ANNIE BEAMS, *ET AL., Respondents.*

ANSWER BRIEF TO THE PETITION FOR WRIT OF CERTIORARI.

W. T. ANGLIN,
ALFRED STEVENSON,
DICK JONES,
LEON C. PHILLIPS,
E. W. SMITH,
CHARLES A. MOON,
FRANCIS STEWART,
JOSEPH C. STONE,

Attorneys for Appellee Group I.

D. A. RICHARDSON,
L. O. LYTLE,
GEORGE JENNINGS,
HERBERT G. HOUSE,
ROSCOE S. CATE,
HARRY B. PARRIS,

Attorneys for Appellee Group II.

WILBUR J. HOLLEMAN,
J. GARFIELD BUELL,
HOWELL PARKS,

Attorneys for Appellee Group III.

INDEX.

PAGE

SUBJECT INDEX.

Statement 1

The petition of Bennie Scott 1

The petition of Charles Barnett, *et al.* 2

The petition of Tiger, *et al.*, and Lucy Curns, *et al.* 2

All the petitions should be dismissed for failure to comply with the rules or in the alternative the writ should be denied 2

Mis-statements of fact upon behalf of petitioners and their erroneous conclusions of law.

(1) Petitioners make many gross and misleading mis-statements of fact with respect to the stipulation referred to by the Circuit Court of Appeals and described as implementing the evidence 3

(2) The Family Settlement Agreement was not approved by the trial judge or the court prior to the trial. The charges, all and singular, against the trial judge with respect to the Family Settlement Agreement are false 7

(3) The charges made in the petition against Mr. Miller, Assistant United States District Attorney, and against Mr. Kingman, of the Federal Bureau of Investigation, are not supported by the record 10

(4) The charge that counsel for respondents entered into a conspiracy and suppressed evidence is false and without any support in the record 15

(5) The claims of Lucy Curns, *et al.*, are manifestly groundless and false upon their own showing. They could not recover if they were without opposition . . 16

PAGE

The separate rolls of Indians and Negroes..... 17

(6) The claims of Joe H. Tiger, *et al.*, are without any merit. The claims now made are inconsistent with their own admissions at the trial..... 19

(7) We submit that whilst considering the charge of prejudice on the part of the trial judge the proceedings prior to the presentation of the claims of these two groups should be borne in mind, and that the learning and experience of the trial judge in such cases should be considered..... 21

(8) The Negro claimants were not deprived of a hearing in accordance with due process of law guaranteed by the Fifth Amendment to the Constitution.

The trial proceedings do not fail "To reflect that calm and deliberate consideration of the evidence, and that judicial impartiality which are consonant with the principles of justice and due process of law."

The alleged facts cited in the petition for the purpose of showing prejudice against Negroes do not sustain the charge..... 22

TABLE OF CASES.

Cravens v. *United States* (1st Cir.), 22 F. (2d) 605..... 24
Crouch v. *Hooper*, 16 Beaven, 182..... 26
Estate of McDade, 95 Okl. 120, 218 Pac. 532..... 17
Hegler v. *Faulkner*, 153 U. S. 109, 38 L. ed. 653..... 18
Kimberlin v. *Commission of Five Civilized Tribes*, 104 Fed. 653, 44 C. C. A. 109..... 18
Nunn v. *Hazelrigg* (8th Cir.), 216 Fed. 330.....17, 18
Scott v. *Beams, et al.*, 122 F. (2d) 782..... 4
United States v. *Gilbert* (D. C.), 29 Fed. Sup. 507..... 24
Youngblood v. *Magnolia Petroleum Co.*, 35 F. (2d) 578.. 21

STATUTES.

Sec. 21 of the Judicial Code, 28 USCA, Sec. 25..... 27

In the Supreme Court of the United States

No. 846—October Term, 1941.

JOE H. TIGER, *ET AL., Petitioners,*

vs.

ANNIE BEAMS, *ET AL., Respondents.*

ANSWER BRIEF TO THE PETITION FOR WRIT OF CERTIORARI.

Statement.

This, Respondents' answer to the joint petition for writ of certiorari upon behalf of Joe H. Tiger, *et al.*, and Lucy Curns, *et al.*, No. 846, contains references to the petitions of Dora Brady, *et al.*, No. 829, Bennie Barnett Scott, No. 850, and Charles Barnett, Pelo Deere, *et al.*, No. 847—all companion cases.

Each of the three groups composed of Joe H. Tiger, *et al.*, Lucy Curns, *et al.*, and Charles Barnett, Pelo Deere, *et al.*, claim all the estate. Bennie Barnett Scott claims that he is the sole heir. If either should win, the others must lose.

The petition of Bennie Barnett Scott undertakes to adopt the petition of Dora Brady, *et al.*, and the joint petition of Joe H. Tiger, *et al.*, and Lucy Curns, *et al.* This

claimant was indicted in the United States Court at Muskogee, Oklahoma, under his true name, Bennie Scott, on account of his perjury in this case, was convicted, and his conviction was affirmed by the United States Circuit Court of Appeals for the Tenth Circuit, 115 F. (2d) 137. The record shows conclusively that his case is a pure fabrication. He here invokes the precise evidence for which he was convicted of perjury. We contend that he has not complied with the applicable rules, and that he has wholly failed to state any ground for issuance of writ of certiorari. We do not give any further attention to him.

The petitioners Charles Barnett, Pelo Deere, *et al.*, have not stated any ground for issuance of writ of certiorari, and have served upon respondents nothing other than their petition and seem to rely upon the showing made by the other petitioners. Hence we forego any further discussion of these petitioners.

Hereinafter our references to "petitioners" refer only to the groups Joe H. Tiger, *et al.*, and Lucy Curns, *et al.* We contend:

(1) That the petition should be dismissed or, in the alternative, the writ sought should be denied, for failure to comply with the rules of this Court, in that the petition does not sufficiently state the truth about the record and proceedings of the trial court. We respectfully submit that there are so many mis-statements of fact in the petition that it is impossible for this Honorable Court to determine therefrom the material facts which should be considered whilst passing upon the petition.

> (We do not know why these grievous mis-statements are made. We understand that our duty is limited to a presentation of the truth. Therefore, we do not judge opposing counsel. In the circumstances we can-

not forego acknowledgment that we are informed J. D. Simms, Esq., attorney for Joe H. Tiger, *et al.*, was unable to participate in the preparation of the petition. And perhaps due courtesy requires acknowledgment of the fact that the learned counsellor whose name first appears upon the petition is necessarily handicapped in that he has not had suitable opportunity to become familiar with the twelve thousand pages of the record.)

(2) Respondents further contend that the petition falls short of any showing that the proceedings fail "to reflect that calm deliberate consideration of the evidence, and that judicial impartiality, which are consonant with the principles of justice and due process of law."

We challenge the sufficiency of petitioners' proceedings in this Court.

Respondents have covered most of the subject-matter of this petition, both as to the facts and the law, in their separate response to the petition of Dora Brady and Lucinda Watashe, No. 829, to which response, for the sake of brevity and convenience, we here refer frequently in answer to the points in this petition which are not discussed herein. We beg leave to ask consideration of respondents' answer to the petition of Dora Brady and Lucinda Watashe before examination of this answer.

(We here attempt to avoid discussion of the merits, except incidentally and only in so far as it appears necessary to show that the writ should not issue.)

Mis-statements of fact upon behalf of petitioners, and their erroneous conclusions of law.

(1) Petitioners make many gross and misleading misstatements of fact with respect to the stipulation referred to by the Circuit Court of Appeals and described as implementing the evidence. As to this stipulation the deci-

sion of the Circuit Court of Appeals, 122 F. (2d) 782, recites:

> "* * * The trial proceedings and the depositions cover more than twelve thousand pages of typed record. And, in addition, *all parties to these appeals stipulated* that the members of Group I were related to each other and to Siah Barnett, as found and decreed by the court; that the members of Group II were related to each other and to 'Old Man' Conner who was the father of William Conner, Hannah Williams, Jennie Jeffrey, and Thomas Conner, through whom the members of the group claim relationship to the decedent, as found and decreed; and that the members of Group III were related to each other and to their ancestor Jim Lowe (Haryaryechee) in the manner set forth in the findings and decree. Even a resume of the evidence would extend this opinion beyond reasonable bounds, and it would not serve any useful purpose. There were many sharp inconsistencies and irreconcilable conflicts in the evidence, but they were for the determination of the trial court. It may be said in summary that a painstaking review of the voluminous record convinces us that, despite the quantum of countervailing evidence, the determinative findings of the court are adequately supported by substantial evidence, *implemented by the stipulation* referred to, and are not clearly erroneous, due regard being given to the opportunity of the trial court to judge of the credibility of the witness and the weight to be given to their testimony." (Italics ours.)

Note the finding that *all of the parties to the several appeals entered into the stipulation,* which of course included the petitioners here. This finding is true. For convenience of all the appellants in the Circuit Court of Appeals, and in order to shorten the record, this stipulation was made. J. D. Simms, Esquire, attorney for Joe Tiger, *et al.,* one of the petitioning groups, was authorized to prepare the record for all the appellants in the Circuit Court

of Appeals and lodge same there. Upon behalf of all the appellants he procured this stipulation, not knowing at that time whether or not the Circuit Court of Appeals would permit the use of the vast typewritten record, rather than a printed record.

Now the petitioners here say many times that the stipulation referred to in the above excerpt from the decision of the Circuit Court of Appeals was the family contract of settlement which was signed only by members of the three successful groups, the respondents here. Referring to the precise stipulation discussed by the Circuit Court of Appeals in the excerpt above, the petition at pages 14-15 states:

> "The Circuit Court found itself constrained to find it was bound by the findings of the trial court because there was support of substantial evidence, (1) *'implemented' by the agreement between the allies* and (2) giving opportunity of the trial court to judge the credibility of the witnesses and the weight to be given to their testimony. But (1) *the agreement had been approved by the Department of the Interior specifically on condition that it not be taken to implement the evidence of the Three Groups.* * * *" (Italics ours.)

The word "allies" appearing in the above excerpt plainly refers to the parties who entered into the Family Settlement Agreement. And it is expressly stated that the stipulation referred to by the Circuit Court of Appeals was approved by the Department of the Interior. It is perfectly evident that counsel who wrote the petition never read the decision of the Circuit Court of Appeals which recites that the stipulation in question was entered into by *all the appellants, including these petitioners.* And it is clear that the writer of the petition did not know that all of the parties to the appeal, as recited in the Circuit Court's opinion, had

signed a stipulation which did not relate in any manner whatsoever to the family contract, to which stipulation, and that only, reference was made by the Circuit Court of Appeals.

At page 3 of the petition it is stated that one of the questions for this Court's decision is:

> "Whether the contract between the three prevailing groups of claimants in which they stipulated that they are a family related to each other and to Jackson Barnett and agreed to share whatever spoils any group obtained in this action, is void and contrary to public policy, conducive to perjury and the suppression of evidence, and *improperly 'implemented'* the record in behalf of the Three Groups, patently influencing both courts below." (Italics ours.)

Here again it is clear that the writer of the petition confused the Family Settlement Agreement, entered into only by the prevailing groups, with the separate and later stipulation made upon behalf of all the parties to the appeal, after the appeal was lodged in the Circuit Court of Appeals.

At page 12 the petitioners say:

> "The Circuit Court of Appeals, faced with 'sharp inconsistencies and irreconcilable conflicts in the evidence' upheld the trial court on the ground that there was substantial evidence *'implemented by the stipulation'* to support the findings (122 F. (2d) 777, 782)." (Italics ours.)

At page 13 of the petition it is stated that the Circuit Court of Appeals erred "In holding that the findings are supported by substantial evidence *'implemented by the stipulation'* or agreement, and cannot be disturbed on appeal." (Italics ours.)

At page 17 of the petition the false statement is made that "The Circuit Court of Appeals specifically finds substantial evidence only when '*implemented by the stipulation*' sufficient to support the findings of the trial court." (Italics ours.)

The petition contains other mis-statements of fact to the same effect. Every reference to the Family Settlement Agreement as "implementing" the evidence constitutes a mis-statement of fact. To sum up on this point: The stipulation to which the Circuit Court of Appeals referred as implementing the evidence was the precise stipulation entered into by all the parties to the appeals, including the petitioners here, and including the respondents. But here we find the petitioners asserting that the implementing stipulation referred to in the decision of the Circuit Court of Appeals was the Family Settlement Agreement.

(2) At page 2 of the petition it is stated that the court approved the Family Settlement Agreement "prior to trial". At page 14 it is stated that the Assistant United States Attorney "persuaded the trial court to approve the contract * * *." On the same page it is said: "The trial court approved the contract in advance of hearing evidence * * *", and again, "the trial court having approved the contract * * *."

The record does not contain anything supporting these charges. Not until the trial upon the merits was concluded did the trial judge know who the parties to the Family Settlement Agreement were, or its terms. In fact, he declined to have anything to do with it until the matter came on in due course for hearing.

Commencing at page 10 of respondents' answer to the petition of Dora Brady, *et al.*, No. 829 in this Court—a companion case—we state the true facts about this matter.

Mr. Miller, Assistant United States District Attorney, upon examination by Mr. Pinson, counsel for the Lucy Curns group, testified in part as follows (Tr., p. 8532):

> "The Court: Now, Mr. Miller, didn't I tell you when you came in there that I wasn't going to have anything to do with that matter until it got to me as a judge?
>
> A. Yes, sir.
>
> The Court: And wouldn't express any opinion but that so far as I was concerned I wouldn't treat it as a matter of contempt?
>
> A. Yes, sir, that is true."

There is no evidence contradicting Mr. Miller.

The trial upon the merits closed June 23, 1938, with reservation for further hearing as to the Family Settlement Agreement. Commencing February 27, 1939, the evidence and argument was heard with reference to the Family Settlement Agreement, at which hearing the following colloquy occurred (Tr., p. 8508):

> "The Court: They asked whether I would take that as contempt in settling this case. I told them I wouldn't, but I wouldn't pass on it.
>
> Mr. Pinson: Your honor never saw this contract?
>
> The Court: No, I didn't know what it was. I never saw that contract until it was introduced in evidence.
>
> Mr. Pinson: And I doubt if you have studied it.
>
> The Court: I have never studied it. *I have never passed on the merits of the contract.*" (Italics ours.)

We have shown in respondents' answer to the petition of Dora Brady, *et al.*, No. 829, that trial judge requested the Circuit Court of Appeals to assign a judge to pass upon the Family Settlement Agreement, and that the Cir-

cuit Court of Appeals denied the request. The record shows abundantly that when the Assistant United States Attorney, at the request of the Attorney General, inquired of the trial judge prior to the trial as to whether or not approval of the contract by the Secretary of the Interior would be such invasion of the court's authority as to constitute contempt, the judge did not know who the parties to the family agreement were, nor the terms of the contract.

At page 10 of the petition the false charge is made that the United States District Attorney "made an *ex parte* presentation of the case of the Three Groups to the Court prior to hearing of evidence for any claimants."

At page 7 of the petition there appears the following false statement with respect to the trial judge:

> "Despite some protestations somewhat to the contrary, the trial court treated the departmental approval as a determination in favor of the Three Groups as the rightful heirs."

It is well known that the Secretary of the Interior has no authority to determine heirs of deceased allottees in the Creek Nation, or in any of the other four of the Five Civilized Tribes. There is nothing in the record to support the charge that the learned trial judge treated the Secretary's approval as a determination of the heirship in favor of the three contracting groups who made the family settlement agreement.

These statements quoted above constitute in effect a charge that the trial judge was wanting in judicial integrity. The assaults upon the trial court and the judge thereof are indefensible, scandalous and contemptuous. In this connection please see our discussion under the caption "The Trial Judge", at pages 14-15 of respondents' answer to the petition of Dora Brady, *et al.*, No. 829.

Other unfounded charges against the trial judge are hereinafter cited and discussed.

(3) *The charges made in the petition against Mr. Miller, Assistant United States District Attorney, and against Mr. Kingman, of the Federal Bureau of Investigation, are not supported by the record.*

At page 3 of the petition it is stated that the Assistant United States District Attorney participated as an active partisan "on behalf of the prevailing claimants in this private litigation *using in defiance of instructions his official position* to sponsor witnesses for the prevailing claimants and to intimidate all others with threats of grand jury prosecutions interfered with due process of law guaranteed by the Fifth Amendment to the Constitution of the United States." (Italics ours.)

At page 8506 of the record there appears in part the testimony of Mr. Miller, who says that he made a report of the case at great length to his superior, the Attorney General, and that he wrote the Attorney General fully about his attitude and conduct in the case, the objects to which his efforts were directed, and told the Attorney General the history of the case, in so far as the District Attorney's office was concerned. Then he added: "I don't think I got an answer to that letter. I just supposed that closed the matter, that it was satisfactory to him." With respect to his letter to the Attorney General, Mr. Miller answered: "I got no answer. If I write an explanation and you say nothing more, wouldn't you suppose that was a satisfactory explanation? That is the way I took it."

Mr. Miller's extended report with respect to his conduct in the case arose thus: Mr. Pinson, attorney for Lucy Curns, *et al.*, had written a letter to the Attorney General

complaining of Mr. Miller's conduct in the course of the proceedings, and the Miller letter to the Attorney General was in response to an inquiry from his said superior, the Attorney General. The Attorney General, having received and considered Mr. Miller's report, and having failed to respond to the Miller letter, carries the plain inference that Mr. Miller's conduct was satisfactory to the Attorney General.

We have shown in respondents' answer to the petition of Dora Brady, *et al.*, at pages 15, *et seq.*, that the course of conduct followed in the instant case is in accordance with the United States statutes with respect to the powers of governmental representatives in cases involving the property of restricted Indians.

The unfounded charge, cited above, to the effect that the Assistant United States District Attorney intimidated all witnesses other than those for the respondents "with threats of grand jury prosecution", is without support in the record. The truth about the matter is found in the uncontradicted testimony of Mr. Miller (Tr., pp. 8532-8535). The high points of the above cited testimony of Mr. Miller are as follows: Mr. Pinson was suggesting that newspaper publicity was given from the District Attorney's office that a grand jury would be called at the close of the trial, to investigate crimes committed during the course of the trial. Mr. Miller denied that the newspaper publicity originated in the District Attorney's office, and said "I know they didn't get it from me." (Tr., p. 8533). Upon cross examination of the witness Miller this question was asked:

> "Isn't it a fact the presiding judge said that he would not permit a criminal investigation during the progress of the case because some one would charge it would be an effort to coerce?"

to which the following answer was given:

"That was my understanding." (Tr., p. 8534.)

And then this question was asked and answered as follows:

"Mr. Richardson: Is it not also a fact the case was drawing to a close?

A. I think so. It was at one of the late hearings at Okmulgee, I think." (Tr., p. 8534.)

After discussion by the court and counsel of prior proceedings, and while Mr. Miller was still upon the witness stand, the hearing proceeded as follows (Tr., pp. 8534-35):

"The Court: And then I said that when this case —later on I would call this to the attention of the Department and recommend that investigation.

Mr. Pinson: But this was before that at Muskogee.

The Court: *It was my duty to do it when they admitted perjury.*

Mr. Pinson: *I agree with your honor.*

The Court: But I didn't think it ought to be held until the case was concluded. It might be proper if it is going to drag on to investigate it anyway.

Mr. Pinson: Yes, sir, and I think it would only be proper to be investigated by some one who is not concerned.

The Court: Well, the Department would handle that I am sure."

The trial judge did not call the grand jury, nor did he preside as judge when many of the parties to the litigation and numbers of their witnesses were indicted. Complaint is made in the petition that indictments were returned before final disposition of the case by the trial court. Apparently it has not occurred to counsel for the petitioners that the time limit for indictment as fixed by the statute

would have expired had the government delayed the investigation and indictments until final decision by the trial court. No indictments were returned until after the close of the trial.

At page 6 of the petition it is charged that Mr. Miller presented the Family Settlement Agreement to the trial judge prior to the trial. The record does not sustain this statement. The Family Settlement Agreement was never presented to the trial judge by anybody prior to the trial. It was first presented to the judge in open court at the trial, as we have shown above.

At page 14 is the charge that Mr. Miller, Assistant United States District Attorney, presented the Family Settlement Agreement to the trial judge prior to the trial, and persuaded the trial judge to approve the Family Settlement Agreement. Nothing of the sort occurred, as shown above.

At page 3 of the petition it is asserted that Mr. Kingman, of the Federal Bureau of Investigation, worked solely during the trial with the prevailing claimants *in the preparation of their witnesses against other claimants.* This is wholly false. There is nothing in the record to sustain the charge that Mr. Kingman worked with the prevailing claimants, respondents here, in preparation of their witnesses against other claimants, nor does anything of the kind appear. Mr. Kingman's testimony is in part as follows: That the Attorney General of the United States requested him to investigate the case (Tr. p., 4318); that his assignment was for the purpose of making investigation on behalf of the government, to find out what the real facts were (Tr., p. 4323). He further testified (Tr., pp. 8580-81) that he consulted with a lot of people, including his questioner Mr. Pinson, attorney for Lucy Curns, *et al.* Then the Court inquir-

ed, "Did you consult with him?", referring to Mr. Pinson. Mr. Pinson interrupted, saying: "Yes, sir, that is true after this thing came to a show-down I talked to Mr. Kingman for the first time." (Tr. p. 8580). Thereupon, during Mr. Pinson's examination of the witness Mr. Kingman, the following questions were put and answered (Tr., p. 8581):

Q. "But Mr. Kingman, isn't it a fact you never consulted with an attorney except for these three groups until after the evidence was all in, except maybe a few rebuttal witnesses?

A. Oh, yes, right in the very beginning, as early as the fall of 1936. You understand I don't know yet who you represent. It don't make any difference.

Q. I know that. I wish you wouldn't assume I am charging you with conspiring, because that is the last thing in mind.

A. I don't know who Howell Parks represents. I became acquainted with him.

* * * * * * *

The Court: The investigation you made was to ascertain the facts and not to help anybody?

A. That is right."

In support of this charge the fact is cited that one witness—only one—upon behalf of respondents testified against respondents by deposition, and afterwards in open court retracted her testimony. The record does not show the reason why she made the change. On the other hand, many witnesses for various other groups, including two of the most important witnesses upon behalf of Joe H. Tiger, *et al.*, returned to the witness stand at the trial and retracted the evidence which they had given in court in support of Joe Tiger, *et al.*, and gave detailed explanation for the retraction of their first testimony. These two witnesses claimed that

an agent of Joe Tiger, *et al.*, had fraudulently induced them to testify falsely in the first instance. The conduct of two members of the Joe Tiger group, namely, Joe Tiger himself and Peter Hamilton, and of their said agent, resulted in the return of indictments against Joe Tiger and Peter Hamilton for prejury, and also an indictment against their said agent. We do not claim that these indictments which are referred to in this petition are proof of guilt, but we do claim they at least tend to show that Mr. Kingman, agent of the Federal Bureau of Investigation, was not working to assist the respondents, as asserted in the petition, but for the purpose of protecting the court from perjury. The record does not contain anywhere any matter whatsoever reflecting or tending to reflect upon counsel for the respondents, or upon any witness for respondents, except in the case of the one Indian above referred to, who changed her story for reasons not apparent in the record. A full discussion of the Family Settlement Agreement is found in respondents' brief, Vol. III, commencing at p. 218, which brief was presented as part of an appendix offered in support of the petition of Dora Brady, *et al.*

(4) *The charge that counsel for respondents entered into a conspiracy and suppressed evidence is false and without any support in the record.*

At pages 13-14 of the petition it is stated that the lawyers for the parties to the Family Settlement Agreement "conspired together", and that "Evidence challenging the claims of the others is suppressed". There is nothing in the Family Settlement Agreement (Conner's Exhibit #73) to support this charge. On the other hand, the agreement was approved subject to the condition that all the evidence available to the parties to the agreement should be fully and fairly presented to the court. Counsel for respondents com-

plied with this requirement. Both the trial court and the Circuit Court of Appeals made findings to the effect that there is nothing whatsoever in the evidence to sustain this charge. See:

> Findings of the trial court, Clk. Tr. Vol. II, pp. 1132-1171;
>
> Findings of the Circuit Court of Appeals upon the point, *Scott* v. *Beams*, 122 F. (2d) 785, 786.

For the uncontradicted evidence sustaining these findings see testimony of D. A. Richardson (R. 8590, *et seq.*), and N. A. Gibson (R. 8603, *et seq.*).

The court inquired of Mr. Pinson, attorney for the Lucy Curns group, as to whether or not he claimed any evidence was suppressed that would help either of the two groups here constituting the petitions. To this question Mr. Pinson answered, "I don't know, Your Honor." (R. 8514). And it was this same Mr. Pinson who attempted to become a party to the alleged conspiracy. When the hearing was had upon the settlement agreement, this question was put: "Mr. Pinson *didn't you try* to get the parties to the contract to take you in?", to which he gave the answer, "*I did*". (R. 8623).

Thus we find counsel for the Curns group in an impossible situation. He cannot vindicate himself by claiming want of knowledge of the terms of the instrument. He fought to prevent the Secretary of the Interior from approving the instrument on account of its terms.

(5) *The claims of Lucy Curns, et al., are manifestly groundless and false upon their own showing. They could not recover if they were without opposition.*

These petitioners contend that Andrew Sullivan, a Creek Freedman, was the husband of Thlesothle, a full-

blood Creek Indian of Tuckabatche Town; that of this union were born Tecumseh Andrews and Jackson Barnett. That after Thlesothle's death Andrew Sullivan married another woman, Patsy Barnett, and that of this union was born Rebecca, the mother of these petitioners. Whatever claim they have, therefore, to this estate is by virtue of the blood of the alleged father Andrew Sullivan.

The evidence wholly fails to disclose any proof of any kind whatsoever, either hearsay or otherwise, that Andrew Sullivan was ever married to Thlesothle, or that he ever cohabited with her at any time. The records of the Dawes Commission show that Andrew Sullivan was a slave of William Sullivan. It therefore follows that he was incapable of contracting marriage with the Indian woman Thlesothle. The Oklahoma law applicable to such a state of facts is found in *Estate of McDade,* 95 Okl. 120, 218 Pac. 532. Had such marriage occurred it would have been absolutely void, and the paternal line of such pretended marriage would have been incapable of inheritance. This we have shown in Vol. II, page 140, of respondents' brief presented and filed in the Supreme Court as an appendix to the petition of Dora Brady, *et al.*

The Dawes Commission was required to make separate rolls of negro members of the tribe who were the slaves or descendants of slaves of Creek Indians. Indians, whether of the full blood or mixed blood, were enrolled upon the final citizenship rolls as Indians. The Acts of Congress requiring the enrolment of negroes separate from the Indians are found and discussed in *Nunn* v. *Hazelrigg* (8th Cir.), 216 Fed. 330, where it is said:

> "The Dawes Commission thus created and existing was a quasi judicial body. *Kimberlin* v. *Commission of Five Civilized Tribes*, 104 Fed. 653, 44 C. C.

A. 109. It was expressly required to make separate rolls of the Indians and freedmen. To be enrolled as a Creek Indian, it was not sufficient for an applicant to show that he was an Indian, but he must show, and the commission must find, that he was an Indian of the Creek Tribe; and to be enrolled as a freedman it was not sufficient to show that he was an African, but he must show, and the commission must find, that he was a former slave or the descendant of a former slave of some member of the Creek Tribe, or at least a slave of some other person adopted by the Creek Nation."

Shortly after the close of the Civil War, on June 14, 1866, the United States entered into a treaty with the Creek Nation whereby their former slaves and descendants of their slaves acquired all the rights and privileges of the Indian citizens of the tribe.

Note, if the Court please, that *Nunn* v. *Hazelrigg, supra,* cites *Hegler* v. *Faulkner,* 153 U. S. 109, 38 L. ed. 653, which is strongly relied upon by petitioners, and distinguishes that case from the many reported cases relating to the Five Civilized Tribes, such as *Kimberlin* v. *Commission of Five Civilized Tribes,* 104 Fed. 653, 44 C. C. A. 109. The case of *Hegler* v. *Faulkner* involved a member of a primitive tribe of Indians, with whom the government dealt specially and in an entirely different manner from that employed in dealing with members of the Five Civilized Tribes. Commencing at page 27 of respondents' answer to the petition of Dora Brady, *et al.,* No. 829, we have discussed the force and effect of the records of the Five Civilized Tribes, and there cited authorities.

Both of the petitioning groups here, who are negroes, presented their claims without recognizing the force and effect of the enrolment records, and by this course of conduct, together with other matters of record, provoked the

trial court and brought about the criticised remarks made by him. The claims of Lucy Curns, *et al.*, are wholly unsupported by any enrolment record. The parol proof offered was so clearly incredible that the patience of the trial judge was exhausted. The real complaint of petitioners is because of the consideration he gave to the enrolment records.

At page 140, *et seq.*, Vol. II, of our answer brief first filed in the Circuit Court of Appeals, we have discussed fully the Curns-Gentry claims.

(6) *The claims of Joe H. Tiger, et al., are without any merit. The claims now made are inconsistent with their own admissions at the trial.*

The contentions of this negro group, all of them full-blood negroes except only one of mixed blood, are very similar to those of the Curns group discussed *supra.* At the trial they admitted that they claimed only on the maternal side, through Thlesothle, admittedly a full-blood Indian. They failed to identify the alleged Thlesothle through whom they claim as the identical Thlesothle who was the first wife of Siah Barnett. Instead of showing connection with Thlesothle, the first wife of Siah Barnett, they were shown to be relatives of an entirely different woman with a similar name, commonly called Lizzie, and also called Timohechee. In order to show connection with Jackson Barnett they had to establish the claimed relationship of Petille and Sarfulley to Thlesothle, Jackson Barnett's mother. There is not any record of the Commission to the Five Civilized Tribes showing any such relationship. Now they assert claims on the paternal side.

Mr. Patterson in the main conducted the trial upon behalf of this group. At page 1309 of the record the following appears:

"Mr. Patterson: If the court please, I don't believe your honor caught it. This is not a contest as to the Siah Barnett side. If we come in at all we come in through the mother of Jackson Barnett. There is no dispute on that.

Mr. Anglin: In other words, you don't question our allegations as to the father of Jackson Barnett?

Mr. Patterson: We are not offering any evidence on that."

These petitioners failed to recognize the force and effect of the tribal and final rolls of the Creek Nation. The final rolls of Creek Indian citizens show that all the children of Siah Barnett, the father of Jackson Barnett, whose estate is here involved were full-blood Indians, and they are enrolled as such. The failure of this group to impeach the enrolment records by the incredible testimony of their witnesses impressed the trial judge unfavorably. In Vol. II of our said brief exhibited here by Dora Brady, *et al.*, we have discussed the claims of Joe H. Tiger, *et al.*, citing the record and authorities.

The respondents proceeded in a manner entirely different from these petitioners. We introduced a great array of documentary proof and many unimpeached witnesses. An abstract of these exhibits and of the testimony of the witnesses upon behalf of respondents may be found under the caption "THE CLEAR WEIGHT OF THE EVIDENCE DOCUMENTARY AND ORAL, SUSTAINS THE FINDINGS OF THE TRIAL COURT IN FAVOR OF THE APPELLEES AND AGAINST ALL OTHER CLAIMANTS," commencing at page 16, Vol. 1 of respondents' brief filed in the Circuit Court of Appeals, which has been presented here as shown above.

The trial court considered the claims presented by these two groups of petitioners as too flagrant for tolerance.

(7) ***We submit that whilst considering the charge of prejudice on the part of the trial judge the proceedings prior to the presentation of the claims of these two groups should be borne in mind, and that the learning and experience of the trial judge in such cases should be considered.***

We know of no reported case in America where perjurers appeared in such great number. Many of the groups presented purely pretended and fabricated cases. It is the duty of every trial judge to protect his court against frauds, and particularly against perjury. In the circumstances the criticised remarks of the trial judge were unavoidable. He knows the attorneys who presented the case. He personally knew many of the witnesses. We believe that he has presided as judge in more Indian cases than any other living judge.

Under the caption "THE TRIAL JUDGE" in our answer to the petition of Dora Brady, *et al.*, we have outlined in brief the great and honored career of the able and fair minded trial judge whose judicial integrity is here under attack. We believe we can fairly state it is matter of common knowledge that his career has not been surpassed in the State of Oklahoma—first, as Chief Justice of the Supreme Court of the state, then Governor for four years, long-time United States District Judge for the Eastern District of Oklahoma, and now Circuit Judge of the Court of Appeals for the Tenth Circuit. Now in honorable retirement, he was assigned to preside at the trial of this case because of his peculiar qualifications in such matters.

The Circuit Court of Appeals for the Tenth Circuit has made special references in its decisions to the long experience and ability of the trial judge, Hon. R. L. Williams. One of these cases is that of *Youngblood* v. *Magnolia Petroleum Co.*, 35 F. (2d) 578, where it was said:

"The trial court has had unusual experience with Indians, and long experience in dealing with oral evidence, and of observing the effect of large sums of money upon the memory of things long past. Even in an equity case, the judgment of an appellate court, confronted with the record, should not lightly displace the judgment of the trial court, who has had the advantage of observing the witnesses upon the stand.

* * * * * * *

"The questions of the trial court disclosed nothing but an effort to get at the facts. Futhermore, the record shows that the trial of the case was concluded on January 31, 1928, and was thereafter briefed by both sides; the trial court considered these briefs until the 18th day of the following October, when he decided the case."

In this connection we beg to refer to the fact that in the instant case Judge Williams considered the matter for an unusually long time after the trial had closed, and made his findings and conclusions at such great length as to show that he had carefully and fairly weighed and considered the record in its entirety.

(8) ***The Negro claimants were not deprived of a hearing in accordance with due process of law guaranteed by the Fifth Amendment to the Constitution.***

The trial proceedings do not fail "To reflect that calm and deliberate consideration of the evidence, and that judicial impartiality which are consonant with the principles of justice and due process of law."

The alleged facts cited in the petition for the purpose of showing prejudice against Negroes do not sustain the charge.

It will be remembered that prior to the trial, upon behalf of the Attorney General, Mr. Miller inquired of the judge as to whether or not the contemplated approval of

the Family Settlement Agreement would be such an invasion of the judicial power as to constitute contempt. It is charged that the judge commented upon the situation presented by Mr. Miller to the effect that if full-blood Indians made a joint effort to defeat the claims of negroes and other non-citizen claimants, probably the contract would not be against public policy. We have shown above, citing the record, that the only thing the judge said to Mr. Miller was to the effect that he would not consider approval of the settlement agreement as contempt of court. The judge himself so declares, and he is supported by Mr. Miller, who when recalled as a witness, testified as follows (R. 8532):

> "The Court: Now, Mr. Miller, didn't I tell you when you came in there that I wasn't going to have anything to do with that matter until it got to me as a judge?
>
> A. Yes, sir.
>
> The Court: And wouldn't express any opinion but that so far as I was concerned I wouldn't treat it as a matter of contempt?
>
> A. Yes, sir, that is true."
>
> (We have quoted this above, and here quote again, for convenience of the Court and for sake of emphasis.)

But had the trial judge made the statement attributed to him, the same would be of no importance here. Already it fully appeared from the depositions that the alleged negro wife and her alleged son by Jackson Barnett, the so-called Bertha Barnett and Henry Barnett, were impostors, and that they had been presenting, by depositions, a wholly fabricated claim. (Any and all references then made to negro claimants could have been only with respect to these pretenders, who were later joined by the impostor Mayetta Kingston. They could not have related to the negro petition-

ers here, because they had not introduced any evidence in support of their several claims.) These depositions had already been opened and published. Had the judge commented with respect to these false claims, he must have had information either from the United States District Attorney's office or from the depositions already of record. Doubtless the judge was already advised that request had been made to the Attorney General for a special investigation of these claims. If Mr. Miller, the Assistant District Attorney, at that time advised the trial judge of the false claims of this negro group, his acts were altogether proper, for a district attorney may always advise with the trial judge with respect to criminal matters. This is true even when criminal cases are being heard. Please see:

Cravens v. *United States* (1st Cir.) 22 F. (2d) 605;
United States v. *Gilbert* (D. C.), 29 Fed. Sup. 507.

The Circuit Court of Appeals held that the false claims of this group, composed of the alleged Bertha Barnett, Henry Barnett, and Mayetta Kingston, constituted one of the major factors which induced the parties to enter into the Family Settlement Agreement. 122 F. (2d) 786. These false claimants, known as the Bertha Group, placed their main reliance in the great and perhaps unprecedented number of their witnesses. Perjurers in great crowds testified for the Bertha Group. A large part of the record consists of the testimony upon behalf of this group.

These petitioners have no proper interest in what may have occurred with respect to Bertha, the pretended wife of Jackson Barnett, and her pretended children by Jackson Barnett. Both Bertha and Mayetta finally admitted facts constituting perjury. We submit that the petitioners have no reason to complain of whatever may have

been said with respect to the wicked perjured Bertha Group. Bertha, Henry and Mayetta were indicted for their crimes in this case, and they are amongst the parties whose indictment is referred to and protested in the petition.

The next instance mentioned in support of the charge of prejudice appears in the petition at pages 8 and 9, where it is claimed that the trial court persistently throughout the trial evidenced bias against all claimants and witnesses other than those for the Three Groups, especially persons of negro blood. And it is said in the petition, with respect to the trial judge, that he "added in substance that *he should not be expected to believe the statements of negro claimants.*" (Italics are petitioners'.) This charge is utterly untrue. The judge did not make any such statement as that attributed to him. What he really said occurred during the examination of Lucy Curns, one of the petitioners. She admitted that her father was a negro (Tr., p. 4075), and that her mother was a negro (Tr., p. 4086). The enrolment record showed that her maternal grandfather was a negro. From the evidence, her own admissions and personal appearance, the court found that she was a negro. She was, by her own admission, enrolled as a Creek Freedman (Tr., p. 4070), and was on the Dunn Negro Roll (Tr., p. 4071). She testified that she was a member of the Indian Tuckabatchee Town, where negroes could not be enrolled. Considering all these matters, and giving due force and effect to the enrolment records, the trial judge stated: "When she swears Jackson Barnett was her uncle and the proof shows he was Indian and the record shows they are negroes, how can you expect me to believe her evidence?" (Tr., p. 4088). This is the statement to which petitioners refer. The trial judge did not say, even in substance, that he would not believe negroes. His statement was merely an

inquiry as to how it could be expected that he, the judge, could believe the witness's evidence, which was in plain conflict with her own admissions and the enrolment records. He was merely inquiring how it could be expected that he, the trial judge could believe that the witness, a full-blood negro, was the niece of Jackson Barnett, a full-blood Indian.

In support of the claim of prejudice the petition quotes the statement of the trial judge, "I always let them put that stuff in and not pay attention." (Tr., p. 4077). This statement was made with reference to certain hearsay testimony by the witness Lucy Curns as to what had been told her by her deceased grandfather. The court permitted its introduction, over objection, with the above remark. We are unable to distinguish this comment by the trial court from that of the great Lord ROMILLY who said, with respect to this class of evidence, that he never had any difficulty in disregarding it. *Crouch* v. *Hooper*, 16 Beaven, 182.

The court was justified in disregarding this hearsay evidence, because the rolls, both Freedmen and Indian, were before him, and the admissions of the witnesses were before him. We admit that this class of hearsay evidence is admissible where it is impossible to produce other and better evidence, and it is admissible in support of documentary evidence, to clarify a situation. *But it is valueless to impeach the solemn judgments of the Dawes Commission, a quasi judicial tribunal.* The trial judge was protesting the vain efforts made by the petitioners to impeach the judgments of the Dawes Commission by this particular unreliable class of evidence.

The further claim is made that the court harassed attorneys for the claimants other than the three groups, interfering with the direct examination of the witnesses. The

judge criticized only when counsel made intolerably wide departures from the manifest truth supported by the documentary evidence, and from the well known applicable law governing such matters.

The foregoing constitute the whole of the charges of prejudice. The petitioners apparently do not so much as make any effort to show *personal* prejudice against *any party* to the litigation, and it is only personal prejudice against a litigant that may be invoked in support of a charge of prejudice. There is complete failure of any showing that the judge had a personal bias in favor of respondents or personal prejudice against the petitioners. In support of our contention that the alleged bias and prejudice is not of the kind or nature such as to cause a reversal of the case, please see Vol. III, p. 187, *et seq.*, of our brief filed in the Circuit Court of Appeals, which is part of an appendix attached to the petition of Dora Brady, *et al.* See also Sec. 21 of the Judicial Code, 28 USCA, Sec. 25.

Wherefore, Respondents respectfully pray that the petitions be dismissed or, in the alternative, that writ of certiorari be denied.

Respectfully submitted,

W. T. ANGLIN,
Holdenville, Oklahoma;

ALFRED STEVENSON,
Holdenville, Oklahoma;

DICK JONES,
Oklahoma City,
Oklahoma;

LEON C. PHILLIPS,
Oklahoma City,
Oklahoma;

E. W. SMITH,
Henryetta, Oklahoma;

CHARLES A. MOON,
Muskogee, Oklahoma;

FRANCIS STEWART,
Muskogee, Oklahoma;

JOSEPH C. STONE,
Muskogee, Oklahoma;

Attorneys for Appellee Group I.

D. A. RICHARDSON,
First National
Building,
Oklahoma City,
Oklahoma;

L. O. LYTLE,
Sapulpa, Oklahoma;

GEORGE JENNINGS,
Sapulpa, Oklahoma;

HERBERT G. HOUSE,
Muskogee, Oklahoma;

ROSCOE S. CATE,
Muskogee, Oklahoma;

HARRY B. PARRIS,
Eufaula, Oklahoma;

Attorneys for Appellee
Group II.

WILBUR J. HOLLEMAN,
National Bank of Tulsa
Building,
Tulsa, Oklahoma;

J. GARFIELD BUELL,
Tulsa, Oklahoma;

HOWELL PARKS,
Muskogee, Oklahoma;

Attorneys for Appellee
Group III.

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 829

DORA BRADY ET AL., PETITIONERS

v.

ANNIE BEAMS ET AL.

No. 846

JOE TIGER ET AL., PETITIONERS

v.

ANNIE BEAMS ET AL.

No. 847

CHARLES BARNETT ET AL., PETITIONERS

v.

SUSIE CONNOR ET AL.

No. 850

BENNIE BARNETT SCOTT, PETITIONER

v.

ANNIE BEAMS ET AL.

No. 906

ROSA ALLEN ET AL., PETITIONERS

v.

ANNIE BEAMS ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

444668—42

These five petitions for writs of certiorari, each of which is filed by a separate claimant or group of claimants, seek to review a decision of the Circuit Court of Appeals for the Tenth Circuit (*Scott* v. *Beams*, 122 F. (2d) 777), which held that the respondents are entitled to inherit the estate of Jackson Barnett. It is the purpose of this memorandum to state the position of the United States with respect to this litigation.

Jackson Barnett was a full-blood Creek Indian. Oil was discovered upon his allotted lands and the royalties therefrom produced a large fund which at the time of his death in 1934 was held in trust by the Secretary of the Interior. Shortly after Barnett's death a group of persons claiming to be his heirs initiated proceedings for the appointment of an administrator in the County Court of Muskogee County, Oklahoma. Subsequently, other claimants brought actions to establish their right to inherit. One such action was begun in the District Court of Muskogee County, Oklahoma, and another in the District Court of McIntosh County, Oklahoma. Notice of pendency of each of these three proceedings was served upon the Superintendent of the Five Civilized Tribes, pursuant to Section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239. Thereupon the United States pursuant to the same Act intervened and caused the proceedings to be removed to the United States District Court for the Eastern District of Oklahoma.

After removal the three actions were consolidated at the suggestion of the United States.

The intervening petitions filed by the United States took no position with respect to who were the heirs of Barnett.[1] The petitions prayed that the court require the various claimants to establish their rights by strict proof, that the court determine all other matters involved in the litigation, and that the rights of the United States as guardian of any restricted wards who might be adjudged to be the heirs of Barnett be protected.

The United States has continued to occupy an impartial position throughout the proceedings. Accordingly, it neither joins in nor opposes the petitions for writs of certiorari.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

FEBRUARY 1942.

---

[1] The intervening petitions of the United States did allege that the decree in *Barnett* v. *United States*, 82 F. (2d) 765 (C. C. A. 9), certiorari denied, 299 U. S. 546, annulling the purported marriage of Anna Laura Lowe to Barnett was *res judicata* of her claim to share in his estate. See also *Mott* v. *United States*, 283 U. S. 747; *McGugin* v. *United States*, 109 F. (2d) 94 (C. C. A. 10). The district court upheld this contention and she did not appeal.

U. S. GOVERNMENT PRINTING OFFICE: 1942

Office - Supreme Court, U.S.
FILED
MAR 24 1942
CHARLES ELMORE CROPLEY
CLERK

No. 829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

DORA BRADY and LUCINDA WATASHE,
Petitioners,

vs.

ANNIE BEAMS, et al.,
Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION AND JUDGMENT OF CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

CHAS. E. McPHERREN,
442 Key Building,
Oklahoma City, Oklahoma,
Counsel for Petitioners.

March, 1942

No. 829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

DORA BRADY and LUCINDA WATASHE,
Petitioners,

vs.

ANNIE BEAMS, et al.,
Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION AND JUDGMENT OF CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

Come now, petitioners, Dora Brady and Lucinda Watashe, and as their Petition for Rehearing herein state that the Petition herein for the issuance of a *Writ of Certiorari* to review the proceedings, decision and judgment of the United States Circuit Court of Appeals, Tenth Circuit (*Scott* v. *Beams, et al.*, 122 Fed. [2d] 777), affirming the

proceedings and judgment of the United States District Court for the Eastern District of Oklahoma, which adjudged the respondents, Annie Beams, et al., to be the heirs to the estate of Jackson Barnett, deceased, was denied by this Court, along with several unrelated Petitions for Writs to review said decisions, in an Order entered on March 2, 1942, in material part as follows:

> " * * * In Nos. *829*, 847, 850, and 906, the motions for leave to proceed further in forma pauperis are denied for the reason that the Court, upon examination of the papers submitted, finds no ground upon which writs of certiorari should be issued. The petitions for writs of certiorari are therefore also denied."

That the Court in so finding and concluding that in No. 829, *Dora Brady, et al.* v. *Annie Beams, et al.*, *"no ground was presented upon which a Writ of Certiorari should be issued", and in denying same in the belief of petitioners*, inadvertently in the press of judicial business, and because of the voluminous record herein, and the confusion necessarily occasioned by the effort on the part of other petitioners to append several unrelated petitions to the Petition and Record of petitioners herein, overlooked and failed to note, consider, and evaluate the several basic grounds herein which present radical departures on the part of the trial judge from the usual, fair, impartial, disinterested, and accepted judicial procedure, and which grounds call for the exercise of the power of supervision and correction possessed

by this Court under the Constitution and laws and Rule 38 of the Court.

That petitioners and counsel for petitioners yield to no one in their high decree of respect for the courts, and, *because of said respect, deem it an imperative duty to frankly, fully, clearly and accurately restate the said impelling grounds for the exercise herein of the Court's high and most important jurisdiction, function and duty to review and correct a proceeding and judgment wherein national courts have "so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision"* (Rule 38, para. 5 [b]).

That stripped of immaterial detail that could only serve to confuse, *and presenting only statements of unquestioned record facts for which counsel for petitioners vouch, and the truth of which has not and cannot be questioned,* said good, sufficient and heretofore accepted grounds for the review of such proceedings and judgment, as is herein involved, are restated as follows:

1. (a) That the United States Attorney, having, in compliance with instructions, interpled in this action to determine the heirs of Jackson Barnett, a deceased full-blooded Creek Indian, for and in the name of the United States, specially and solely on behalf of all restricted Indian claimants to said heirship, including petitioners, Dora Brady and Lucinda Watashe, the Assistant United States

Attorney thereafter, and months before this action was set for trial, purporting to represent the United States, on behalf of all said restricted Indian parties, and the Honorable Robert L. Williams, who at the time had been designated as the judge to try this proceeding in the United States Court for the Eastern District of Oklahoma, did, without the knowledge of petitioners or their counsel, prior to and in October, 1936, before petitioners had taken any depositions or presented any evidence, collaborate, confer, and advise together in and about the negotiation, execution and approval by the Departments of Justice and Interior of the United States, and the carrying out of an "agreement" or "family settlement" by and between the groups of respondents, Annie Beams, et al., claimants to said heirship, which had as its stated purpose the securing of a judgment in said court in which said judge was to preside, adjudging said respondents to be the heirs of the said Jackson Barnett, deceased, to the exclusion of petitioners, Dora Brady, et al., claimants other than respondents. (Reasons for allowance of *Writ of Certiorari*, Numbers 1, 2, and 3, pp. 34-36 and 48-111, Petition for *Writ of Certiorari* and Supporting Brief herein.)

(b) That said Assistant United States Attorney and said designated trial judge, prior to October 13, 1936, and almost five months before this proceeding was first set for trial on March 22, 1937, did so collaborate in securing the approval of the said "agreement" or "family settle-

ment" by the officers of the Departments of Justice and Interior to the end that the respondents, Annie Beams, et al., should without doubt be adjudged in said court to be the heirs of said Jackson Barnett, deceased, and the petitioners and all other claimants be defeated in this proceeding, and that the approval of the said "agreement" or "family settlement" by the said trial court was used in influencing said officers to approve same, is clearly established by the correspondence had at the time between the said Assistant United States Attorney and the said officers of the said Departments. That in a letter written by the said Assistant United States Attorney, in the name of the United States Attorney, on October 13, 1936, to the Attorney General, Washington, D. C., it is, among other things, stated:

> "Re: In the Matter of the Estate of Jackson Barnett, Deceased, No. 4556 Equity, Consolidated; Dept. File. HWB-CEC-207695-22;
>
> "I have the honor to acknowledge the receipt of your letter of October 7, 1936, with enclosures, in which you ask for certain information and reports in connection with the above entitled matter.
>
> *"I note that the letter of the Acting Secretary expresses some doubt as to the power of the Secretary to approve the agreement in question, and suggests that its approval might embarrass or prejudice the United States or other parties in the conduct of the litigation.* * * *.
>
> (Said approval certainly did prejudice and defeat the other parties.)

"* * * It is suggested that after the determination of heirship, the Secretary might have no authority to do anything but deliver the estate to the persons directed to the decree. * * * (No doubt this suggestion is sound.)

" * * * *The approval of this agreement cannot embarrass or prejudice the United States in the conduct of the litigation. On the contrary, the approval would materially assist the United States and the full-blood Indians embraced in the three groups.* * * * (Wherein would the approval assist the United States?)

" * * * It seems to me that it is good policy to divide this large estate among as many full-blood Indians as possible, provided, of course, they are blood kin of Jackson Barnett and entitled to inherit.

" * * * *I was advised with at the time this contract was first considered.* The opposing angles between these groups became manifest in the taking of the depositions and the cross-examination of witnesses. The fact was also realized by the parties that one group might prevail and that the other groups might be defeated, although in fact heirs. *The size of the estate justifies a compromise settlement between these claimants, on the theory that they are all in fact blood kin and that in equity and good conscience they should all inherit. I think I am familiar with the facts leading up to this agreement, and I heartily approve the same.* (What facts?)

"*You ask to be advised as to any views with reference to this contract expressed by the trial court. Upon receipt of your letter, I presented the matter to Judge Williams and he was kind enough to frankly discuss the matters involved with me at some length.* * * *" (What matters did the trial judge frankly discuss at some length?)

(How did the Attorney General know the judge who had been assigned to try this case had *expressed*

any *views* with reference to the "agreement" or "family settlement?" Evidently, there had been prior correspondence or communication with regard to same.)

" * * * However, the Court did state if this were a combination or agreement between full-bloods to make a joint effort to defeat the claim of the negro claimants, as wife and children or other non-Indian claimants, that this probably would not be against public policy. *The Court stated that he thought the contract was all right, and that, if approved by the Secretary of the Interior and if it should not be against public policy within the decisions, he would make any orders in his power which would be right and proper to carry same into effect.* * * *"

Is it not clear from the above that the said trial judge was pledged in the event the "agreement" or "family settlement" was approved by the Secretary of the Interior, and was not against public policy, to *"make any orders in his power which would be right and proper to carry same into effect"? It also appears from the record that the Secretary of the Interior on the judges approval of the "agreement" or "family settlement" also approved same, and the trial judge removed the other condition by himself approving said "agreement" or "family settlement" with the result that the judge was free to make proper order to carry same in effect and accordingly entered judgment for respondents so as to carry said "agreement" into effect just as said judge had agreed.*

The said attorney then explains in said letter *the reasons supporting his desire to defeat all claimants other than the respondents, Annie Beams, et al.,* and concludes his

letter as follows:

> **" * * * To do this, it appears to me that a special investigator should be assigned to this office at the earliest possible date to work on this phase of this case, and I so recommend." (Curns Exhibit 43.)**

(c) That influenced by and based upon the said representations contained in the said letter, among same being that the trial judge approved, and the other therein indicated communications, the said Attorney General and the acting Solicitor of the Department of the Interior, Frederick L. Kirgis, approved the said "agreement" or "family settlement", and in a letter dated April 8, 1937, the Secretary of the Interior was so advised and thereupon also approved same. In said letter of the Acting Solicitor the above report or letter of the said United States Attorney is quoted at length and referred to in part as follows:

> " 'It has been suggested that the contract may be against public policy, but it is not entirely clear that this is true. *The United States Attorney in charge of the litigation has stated his approval of the contract and has also discussed the matter with the United States District Judge. The latter has indicated his view that the contract 'probably would not be against public policy'* ". * * *
>
> **(Note the statement that said United States Attorney was in charge of the litigation and that he and the trial judge approved the agreement.)**
>
> " * * * *In support of his recommendation the United States Attorney states that such approval will not only embarrass or prejudice the United States in the conduct of the litigation but on the contrary will materially assist the Government and the full-blood Indians signatory in the agreement.* * * * " (What about the full-

blooded restricted Indians who were not parties to the "agreement"?)

Petitioners respectfully state that it is pertinent to inquire as to just why, as stated in said letter, it would materially assist the United States Government, *as an interpleader herein on behalf of all the restricted Indian claimants to said heirship*, to defeat the claim of these petitioners, Dora Brady and Lucinda Watashe, who are restricted Indian claimants to such heirship, and to make certain through the approval of said agreement, the adjudications of respondents, Annie Beams, et al., to be such heirs to the exclusion of these petitioners? Petitioners further state that it is obvious from the substance of said correspondence that it was the belief of the Assistant United States Attorney and the representatives of the said Departments, that the approval of said "agreement" or "family settlement" would have the effect of securing the adjudication of respondents, Annie Beams, et al., to be such heirs to the exclusion of all other claimants, and that said trial judge had so stated if the "agreement" was not against public policy, and that it is further clear from the record herein presented that such was the effect of said "agreement" or "family settlement."

Petitioners state that the only attempted explanation of said collaboration acts and doings of the said Assistant United States Attorney and trial judge, which was continued throughout said purported trial, was the belated and ridiculous statement on pages 192-196, Vol. III of

Appellee's Brief filed herein in the Circuit Court of Appeals, (Vol. II. pp. 192-196. Appendix herein), *in substance that the reason and objective of said collaboration was to ascertain from the said trial judge whether the execution and approval of the said "agreement" or "family settlement" would be deemed contemptuous!*

It is obvious that said statement in the nature of things could not be true, and that it is in the face of the facts set forth in the above quoted correspondence between the said Assistant United States Attorney and the officers of the said departments which occurred at the time and wherein said officers were advised of the collaboration and statement of the trial judge, and no mention is made of any such fear of being adjudged in contempt, and wherein it is clearly stated that the objective of such collaboration was the adjudging of respondents, Annie Beams, et al., to be the heirs of Jackson Barnett as against petitioners and all other claimants in this action.

That the dire strait in which counsel for respondents, Annie Beams, et al., found themselves in attempting to explain the participation of the trial judge in their plan to secure a judgment in favor of respondents, Annie Beams, et al., and against petitioners and other claimants to said heirship, aptly illustrates the danger resulting from such obstruction of the course of justice.

(d) That thereafter the petitioners, Dora Brady and Lucinda Watashe, duly filed an application or motion for an order declaring a mistrial on account of the said dis-

qualification of the trial judge to hear and determine the issues herein and which motion was overruled (pp. 704-710, Vol. II Clk's. Tr. herein). That after a purported hearing and trial, the salient facts of which are hereinafter presented, judgment was rendered adjudging the respondents, Annie Beams, et al., to be the heirs to the estate of said Jackson Barnett, deceased, to the exclusion of all other parties, in accordance with said "agreement" or "family settlement."

(e) Petitioners respectfully state, aside from and without considering the other grounds or reasons presented in the Petition for the issuance of said Writ herein, and which are hereinafter presented, it is obvious from the above stated unquestioned record acts and facts, clearly revealing the nature, purpose, and effect of the said collaboration by said Assistant United States Attorney and the said trial judge, and the judicial action said judge therein stated would be taken in favor of respondents, Annie Beams, et al., upon the approval of the said "agreement" or "family settlement," that the said United States Attorney, although purporting to represent the United States as interpleader of all restricted Indian claimants to said heirship, and the said trial judge, both thereafter became and were necessarily partisans of counsel for respondents, Annie Beams, et al., as against petitioners, Dora Brady and Lucinda Watashe, in the execution of the purpose of said "agreement" or "family settlement", which was to secure,

in the court presided over by the said trial judge, a judgment adjudicating that said respondents, Annie Beams, et al., were the heirs of the said Jackson Barnett to the exclusion of petitioners, Dora Brady and Lucinda Watashe, *and that it follows that the said trial judge was disqualified thereafter to hear evidence on or determine any of the issues in this action. That in such state of the unchallenged record and facts the sole controlling question is as to whether the Court will, in its sound judicial discretion, exercise its jurisdiction and function of supervising and correcting such proceedings and judgment wherein it appears that there has been a departure from the accepted and usual course of fair, impartial and honest judicial procedure.*

(f) Petitioners state that, as clearly appears from the opinion of the Circuit Court of Appeals, Tenth Circuit, in *Scott* v. *Beams, et al.*, and four other cases, Nos. 2174-2178, purporting to decide, but in fact failing to consider or decide the points presented in the separate appeal of petitioners, *Dora Brady and Lucinda Watashe* v. *Annie Beams, et al.*, No. 2176, in affirming the judgment of the District Court adjudging said Annie Beams, et al., to be the heirs of said Jackson Barnett, deceased, to the exclusion of these petitioners, Dora Brady and Lucinda Watashe, overlooked the true nature, scope, and effect of the above unquestioned record facts, *which conclusively establish that the said trial judge, after being designated to try this case, and long before this case was set for trial, without the*

knowledge of petitioners or their counsel, did collaborate with said Assistant United States Attorney, who purported to represent the United States as interpleader on behalf of all restricted claimants to said heirship, including these petitioners, but who in fact was secretly representing the respondents, Annie Beams, et al., in and about the execution, approval, and carrying out of said "agreement" or "family settlement" by and between said respondents, having as its stated objective the rendition of a judgment herein by said trial judge establishing the heirship of said respondents, Annie Beams, et al., to the estate of the said Jackson Barnett and denying the claims of all other parties, and that the said trial judge did during said collaboration stated to the said Assistant United States Attorney *"that if approved by the Secretary of the Interior, and if it should not be against public policy within the decisions, he would make any orders in his power which would be right and proper to carry same into effect," and that the said statement of said trial judge was reported by the said Assistant United States Attorney to the Department of the Interior and was effectively used in securing the approval by the said Department of the said "agreement" or "family settlement," and that thereafter the said trial judge held said "agreement" or "family settlement" to be valid and not against public policy and entered judgment thereon in accordance with said statement of said trial judge, and in favor of the respondents, Annie Beams, et al., and against*

all other claimants, and that on account of the said collaboration and said statement the said judge was thereafter disqualified to hear, consider or determine any issue between the said respondents, Annie Beams, et al., and all other claimants to said heirship.

(g) That the affirmance by the said Circuit Court of Appeals of said judgment so rendered by said trial judge so disqualified on account of said collaboration, statement, and interest, occurring and arising prior to the purported trial, was clearly in effect a direct, although inadvertent, sanctioning of a most radical departure by the said trial judge from the accepted, usual, impartial, disinterested, and fair course of judicial procedure and under the plain language of paragraph 5b of Rule 38, this Court has the jurisdiction to review said proceedings and judgment through the issuance of its *Writ of Certiorari.*

Petitioners state that under the Constitution and Laws of the United States and said Rule 38, this Court has the jurisdiction, function and duty to supervise and correct such jurisdictional wrong as that here presented, and that the record of procedure of National Courts in instances similar in legal effect to that presented in the case at bar, is that such courts are astute in finding a method for the review of such proceedings and judgments, although same may have become final, where in the conduct and rendition of which, a disqualified judge participated. Petitioners refer to recent cases perfectly in point here as follows:

In re: 671 Prospect Avenue Holding Corp., 105 Fed. (2d) (Second Circuit) 960, Superseding Opinion in 97 Fed. (2d) 513.

Art Metal Works v. *Abraham & Straus*, 107 Fed. (2d) (Second Circuit) 940 and 944, Certiorari Denied December 11, 1939, 309 U. S. 696, 60 Sup. Ct. 611.

Electric Auto-Lite Co. v. *P. & D. Manufacturing Co., Inc.*, 109 Fed. (2d) (Second Circuit) 566, and 78 Fed. (2d) (Second Circuit) 700.

General Motors Corp. v. *Preferred Electric & Wire Corp.*, 79 Fed. (2d) (Second Circuit) 621. Certiorari Denied, 296 U. S. 655, 56 Sup. Ct. 381. Judgment thereafter set aside because of participation of disqualified judge, 109 Fed. (2d) (Second Circuit) 615.

Petitioners most earnestly and respectfully state that if said such judgment, so rendered in this proceeding, wherein the trial judge so flagrantly violated the imperative rules requiring disinterest, impartiality and fair considerate hearing and just decision, and the inadvertent affirmance of said proceedings and judgment by the Circuit Court of Appeals, be in effect approved through the refusal of this Court to consider, review and pass upon said proceedings and judgment, it is urged that such occurrence "will mark the first step toward the abandonment of that imperative requisite of even-handed justice proclaimed by Chief Justice Marshall more than a century ago that the judge must be "perfectly and completely independent with nothing to influence or control him but God and his conscience.' " *United States* v. *Manton*, 107 Federal (2d) (Second Circuit) 834,

Loc. Cit. 846—Opinion by Mr. Justice Southerland, concurred in by Mr. Justice Stone and Circuit Judge Clark.

Petitioners further state that, since the stated collaboration, statements, and interest of said trial judge, and his resultant disqualification was in part discovered by petitioners, Dora Brady and Lucinda Watashe, and said facts, so in part discovered, were pled in applications, affidavits, and motions filed herein before the said judgment was rendered herein, and all possible proceedings taken to prevent said disqualified judge from thereafter purportedly considering and determining the issues and rendering judgment herein, that this Court, having jurisdiction so to do, in the exercise of its sound judicial discretion, may review the said proceedings and judgment and consider and determine the issues herein presented, and save subsequent judicial proceedings and adjudication requisite for relief against such void or at least voidable judgment.

2. (a) That an agreement between litigants, such as the one here presented among groups of respondents, Annie Beams, et al., relating to the proceedings and issues in an action in court, which by its terms permits its use, and which in fact, as the above stated record shows, was so employed herein (Pp. 4-9 and 35-36, Petition for Writ and Supporting Brief herein, and *supra*), in influencing the trial judge to render a judgment in favor of respondents, is inconsistent with the full, impartial and unobstructed course of justice, and is improper, illegal and against pub-

lic policy, although such agreement would not necessarily be adjudged illegal and against public policy where same is not so employed, as the said record shows said "agreement" or "family settlement" was employed in the case at bar, to obtain the active support of the administrative and judicial officers of the Government and the trial judge in securing the judgment herein in behalf of respondents, Annie Beams, et al., and against petitioners (Pp. 48-51, Petition for Writ and Supporting Brief herein wherein this ground is presented).

(b) That having on behalf of the United States interplead all restricted Indian claimants to said heirship, including petitioners, Dora Brady and Lucinda Watashe in this proceeding to determine the heirs of said restricted estate, and while so appearing and being in control of said case and acting for the protection of the United States, as well as in the interest of all such restricted Indian claimants, including petitioners, it follows that thereafter the Assistant United States Attorney was without legal or moral right to, without notice or authority, to so switch his representation to respondents and to participate on behalf of said respondents, Annie Beams, et al., in negotiating, presenting, and securing the execution of the so-called "agreement" or "family settlement", among and on behalf of said respondents, on the part of the officers and representatives of the Departments of the Interior and Justice, and the trial judge, with the purpose of aiding in obtain-

ing a judicial adjudication that said respondents were heirs to the said estate as against and to the exclusion of these petitioners, and other restricted Indian parties.

(c) Petitioners state the fact to be that the said Assistant United States Attorney did not so abandon the equal representation of all said interplead restricted Indian claimants herein and actively represent the respondents, Annie Beams, et al., as against all other claimants, while purporting to be the attorney for the United States as interpleader herein, on account of and as the result of an examination or study of the facts and merits of the claim of any party to this action, and that the said United States Attorney so testified herein, after his said abandonment had occurred as follows:

A. "Oh, no, I never did what you would call investigate a claim. I don't think I heard a Wesley Barnett claim at that time * * * (when he assisted in negotiating said 'agreement').

Q. Then there were full-blooded Indians (claimants) you knew nothing about at the time you wrote this letter? (The letter to the Attorney General relating to the claim of respondents, Annie Beams, et al., being Curn's Exhibit "43").

A. Oh, yes, lots of them." (Pp. 8548-8549, Vol. 18, Rep. Tr., pp. 16-17, Reply Brief herein.)

That after the said discovery of said collaboration of the Assistant United States Attorney with the said trial judge, beginning at that time and extending throughout the proceeding and to the entry of judgment herein, in accordance with the said "agreement" or "family settlement",

the said assistant United States Attorney was interrogated as a witness herein as to his authority to switch his representation on behalf of the United States from all restricted Indian parties to the representation of respondents, Annie Beams, et al., and said attorney answered that he had no express authority so to do as follows:

A. " * * * I don't think I got any answer to that letter (Curns Exhibit 43). I just supposed that closed the matter, and that it was satisfactory to him. * * * "

Q. You just supposed that?

A. I got no answer. If I write an explanation and you say nothing more, wouldn't you suppose that was a satisfactory explanation. That is the way I took it.

Q. You have never since that time received authority to appear for these persons (the respondents, Annie Beams, et al.) as against other groups?

Mr. Richardson (representing respondents): That is objected to, incompetent, irrelevant, immaterial, indefinite.

The Court: I think he should insert the correspondence if he has any. This way is a conclusion.

A. I received no letter, your honor, other than I just stated. * * * "(Curns' Exhibit "43" above.)

The above quotation appears on pages 8506-8507, Vol. 18, Reporter's Transcript (Pp. 19-20 Typewritten Reply Brief of Petitioners herein).

That the said Assistant United States Attorney in said situation, without notice or knowledge of petitioners, Dora Brady and Lucinda Watashe, or their counsel, at the con-

clusion of the presentation of evidence, delivered to the said trial judge for approval, findings of fact and conclusions of law in favor of the said respondents, Annie Beams, et al., and against these petitioners, Dora Brady and Lucinda Watashe, and said findings and conclusions were thereafter approved by the said trial judge.

(d) That in personally participating in any manner in the said negotiation, approval, and carrying out of said "agreement" or "family settlement", and in permitting the said Assistant United States Attorney to so appear and represent said respondents, Annie Beams, et al., as against these petitioners, and other restricted claimants, and to present requested findings of fact and conclusions of law in favor of the said respondents, and against these petitioners, and in so approving same, the trial judge gravely erred, and was thereafter disqualified to purport to hear and determine the issues herein between petitioners, Dora Brady and Lucinda Watashe, and said respondents, Annie Beams, et al., and to render a judgment consummating said "agreement" or "family settlement". (Pp. 51-54, Petition for Writ and Supporting Brief herein; pp. 79-82, Appellants' Brief in Circuit Court of Appeals, Vol. I, Appendix hereto.)

3. (a) That thereafter and on March 16th and 17th, 1938, approximately 17 months after the beginning of said collaboration between the said Assistant United

States Attorney and the trial judge in and about the approval of the said "agreement" or "family settlement", having as its objective the rendition by said judge of a judgment adjudicating the respondents, Annie Beams, et al., to be the heirs of the said Jackson Barnett, deceased, to the exclusion of petitioners and all other claimants, and almost a year after the approval of the said "agreement" or "family settlement" by the representatives of the Departments of the Interior and Justice of the United States through and as the result of the statements and influence of the said Assistant United States Attorney, and said trial judge, as is stated above (pp. 3-5, *supra*), counsel for petitioners, Dora Brady and Lucinda Watashe, being without knowledge of the existence of the "agreement" or "family settlement," and without knowledge of said collaboration, and the approval thereof by the said representatives of the said Departments, and being without knowledge of the fact that the said trial judge had advised the said Assistant United States Attorney that, *"if approved by the Secretary of the Interior and, if it should not be against public policy within the decisions, he (said judge) would make any orders in his power which would be right and proper to carry same into effect"* (pp. 5-10, *supra*), *undertook in their turn, to present evidence in support of the fact that petitioners, Dora Brady and Lucinda Watashe, were the granddaughters of the said Jackson Barnett, deceased, and entitled to inherit his estate as such* (pp. 56-103, Petition for Writ

and Supporting Brief herein containing *verbatim* record and pp. 36-37 and 54-55, same, presenting grounds 4 and 5 for issuance of said *Writ of Certiorari*).

(b) Petitioners state the fact to be that immediately upon said attempt of counsel for petitioners to so present evidence, and without other cause, ground or provocation, *than the prior execution and approval of said "agreement" or "family settlement"*, said trial judge and counsel for respondents, Annie Beams, et al., concurring and acting in concert, repeatedly and continuously throughout the said two-day proceedings, attacked and charged petitioners, petitioners' counsel, employee, and witnesses with improper conduct, fixing witnesses, perjury, subordination of perjury, lack of legal right to represent petitioners, and immorality, and exhibited such high degree of hostility, evidenced by threats, as to render the further presentation of evidence on behalf of petitioners impossible with the result that said effort was finally abandoned (pp. 36-37; 54-111, Petition for *Writ or Certiorari* and Supporting Brief herein. Presenting reasons 3 and 4 for Writ herein, and *verbatim* record of said charges, acts, threats and doings of said trial judge and counsel for respondents).

(c) *That as the result of the said attacks and charges on the part of the said trial judge and counsel for respondents, and the evident fact that said effort to present evidence on behalf of petitioners was serving and could serve no useful purpose, and was a grim and shocking caricature*

without a single characteristic of a judicial proceeding, counsel for petitioners was constrained to abandon said effort to present evidence in support of petitioners' cause, and that the said trial judge thereupon undertook to intimidate and cause said counsel to withdraw from the representation of petitioners (pp. 96 to 103 of Petition and Supporting Brief for Writ herein where said proceeding is set forth *verbatim*). This concluded the presentation of evidence on behalf of petitioners.

(d) Petitioners respectfully state the fact to be that the record and briefs in this proceeding clearly show that all of the above quoted and set forth, repeated, unprovoked, hostile, threatening, intimidating, and oppressive attacks and charges by the trial judge and opposing counsel, acting in concert, upon and against petitioners, petitioners' counsel, employee, and witnesses, occurred during said effort to present evidence herein in support of petitioners' cause, and subsequent to the said negotiation and approval of the said "agreement" or "family settlement" and were motivated thereby, and that the occurrence of same has not and cannot be questioned (pp. 36 and 54-105, Petition for Writ and Supporting Brief herein); *and that the only effort in said proceedings, and in subsequent proceedings and briefs, to justify said attacks and charges consists of unfounded and unreasonable assertions that same were provoked and justified because of the conduct of counsel for petitioners in asking leading questions, attacking the integrity of the*

trial judge, undertaking to impeach tribal enrollment records, and the ignorance of counsel for petitioners. (See pages 105-111, Petition for Writ and Supporting Brief herein.) *That aside from the fact that not one of said charges is in the remotest degree sustained by the record, if true, same could not excuse or tend to justify said attacks and charges against petitioners, petitioners' counsel, employee, and witnesses.*

4. (a) Petitioners state that immediately following said unsuccessful attempt to present evidence on behalf of these petitioners, the trial judge of his own motion recessed the hearing for a period of three months and until June 20, 1938, and during said recess, and on June 11, 1938, a copy of the said "agreement" or "family settlement" and a part of the said correspondence between said Assistant United States Attorney and the officers of the Departments of Justice and Interior, together with a statement of the acts and doings of said officers, including said trial judge, and counsel for respondents, Annie Beams, et al., in relation to the negotiation, execution, approval, and carrying out of said "agreement" or "family settlement" (pp. 3-10, *supra*), were filed in said cause by counsel for other claimants in connection with and as exhibits to an affidavit to disqualify said trial judge from proceeding further in the purported trial of this action; that five days thereafter and on June 16, 1938, information as to the said acts and doings of the said parties and the trial judge first became

known to counsel for petitioners, and through said counsel first became known to the petitioner, Dora Brady, on June 18th, 1938, two days thereafter, the petitioner, Lucinda Watashe, being absent (pp. 18-20, Petition and Brief for *Writ of Certiorari*); that said information as to the said acts and doings of the said United States Attorney, the trial judge, and representatives of the Departments of Justice and Interior, considered in the light of the attacks and charges by the trial judge, above set forth, convinced petitioners and counsel for petitioners that a plan and agreement existed and was being jointly executed on the part of all of the said officers aided by said trial judge as the above record shows, to defeat the claims of all parties hereto other than the respondents, Annie Beams, et al., who were the beneficiaries of said "agreement" or "family settlement"; and that the said concerted attacks upon, threats and charges against these petitioners, petitioners' counsel, employee, and witnesses by the said trial judge and counsel for said respondents, during the said effort to present evidence on behalf of petitioners, were made and perpetrated with the objective of embarrassing and obstructing petitioners in the presentation of evidence in establishing the facts as to the heirs of said Jackson Barnett and to fatally weaken the evidence in support of the cause of petitioners herein to the end that the rendition of the planned judgment in favor of respondents, Annie Beams, et al., and adverse to petitioners, Dora Brady, et al., should be sustained on appeal.

(b) Petitioners state that so believing, as above stated, and further believing that the said acts, threats, and charges on the part of the said judge during said proceedings were motivated by said "agreement" so offered with the result that the mind of the trial judge was biased and prejudiced personally against petitioners, and in favor of respondents, who were the beneficiaries under said "agreement" or "family settlement"; *that so believing and that said personal bias and prejudice against petitioners was so intense, as is evident from the verbatim record of said acts, threats, and doings, as to completely incapacitate the said trial judge to judicially hear and fairly weigh evidence on the part of petitioners, these petitioners on June 18, 1938, within three days after the said above stated information first came to the knowledge of counsel for petitioners, and on the very day said information came to the knowledge of petitioner, Dora Brady, filed herein their said petition and affidavit to disqualify the trial judge on the ground of personal bias and prejudice, and attached thereto proper certificate of counsel that same was filed in good faith and a verbatim transcript of the proceedings wherein said attacks, threats, and charges occurred, together with copies of said correspondence* (pp. 38-40 and 55, par. 7, Petition for Writ and Supporting Brief herein; pp. 512-546, Vol. I, Clark's Tr., herein; and pp. 82-97, Appellants Brief in C. C. of Appeals, Vol. I, Appendix, hereto).

(c) Petitioners state that upon the filing of the said petition and affidavit to disqualify, said trial judge directed counsel for respondents to file a motion to strike same (pp. 1070-1071, Vol. II, Clark's Transcript, herein); said trial judge then of his own motion made an order admitting the entire record in evidence to be considered in passing upon said petition and affidavit to disqualify (p. 1073 same); then permitted counsel for respondents, Annie Beams, et al., to call the petitioner, Dora Brady (pp. 8651-8656, Vol. 18, Ap.), and her employee, Sim L. Liles (pp. 8630-8642 same), and her attorney, L. J. Burt (8648-8650 same), as witnesses in an effort to disprove the truth of the allegations of the said affidavit although based on proceedings appearing in the record, and the good faith of petitioners in filing same; counsel for respondents, Annie Beams, et al., then were directed to file a response to said application and affidavit to disqualify, *putting in issue the truth of all the allegations thereof; and the trial judge thereafter in writing found and concluded that the said application and affidavit were not filed in due time; that same were not in due form; that although same alleged that petitioners did not have knowledge of the facts alleged therein until about the time of filing same, that although there was no evidence to the contrary the court found said statement to be untrue; and further found that the facts alleged for disqualification were without foundation in truth and in fact and overruled same* (pp. 1185-

1189, Vol. II, Clk's Tr., herein; pp. 76-83, Petition for Writ and Supporting Brief herein).

(d) Petitioners state that as appears from the facts of said petition and supporting affidavit to disqualify said judge, the same are in due form in all particulars, and specifically state and present the record of the numerous acts and doings on the part of the said judge which evidenced the disqualification of said judge to try and determine this action on account of personal bias and prejudice against these petitioners, Dora Brady and Lucinda Watashe, and in favor of the respondents, Annie Beams, et al., and as appears from the unchallenged allegations therein same were filed in due time in that same were filed within 2 days after knowledge of the basic facts became known to petitioners and their counsel.

(e) That it is clear from the face of the said petition and affidavit to disqualify said trial judge, as well as the unquestioned record of the proceedings set forth *verbatim* in the affidavit to disqualify said judge, that the Circuit Court of Appeals in finding and concluding and holding in the opinion herein that said petition and affidavit to disqualify, "fell far short of stating facts showing bias and prejudice of the court and therefore failed to comply with the requirements of the statute," and that same stated conclusions and not facts, and that the same was not filed until approximately sixty days "*after the bias and prejudice of the trial court became apparent*," overlooked all of the

proceedings and facts, since a transcript of the proceedings, showing fully said harsh and criminal charges by the trial court, and the fact of said collaboration of the said Assistant United States Attorney and the trial judge was unknown to petitioners until two days before said petition and affidavit to disqualify was embodied in the said application and affidavit to disqualify said trial judge (pp. 512-547, Vol. I, and pp. 1332-1342, Vol. II, Clk's Tr.; pp. 82-97, Appellants' Brief, Vol. I, Appendix hereto, and pp. 118-122-123, Petition for Writ and Supporting Brief herein).

(f) Petitioners state that any finding of fact on the part of the trial court as to the specific place or places of residence, whereabouts, and family relations of said Jackson Barnett from the time of his birth until he was approximately 39 (1891) years of age when he came to live about in the Senora, later Bryant, or Siah Barnett, neighborhood, which was supported by any evidence, would of necessity identify said Jackson Barnett as being the father of Albert (Barnett) Brady, and the grandfather of petitioners, Dora Brady and Lucinda Watashe, and would necessarily defeat the carrying out of the purpose of said "agreement" or "family settlement", being the adjudication of the respondents, Annie Beams, et al., who only claimed collaterally, to be the heirs of the said Jackson Barnett to the exclusion of Dora Brady, et al., since all the evidence on the part of all the parties, except that of the Kentucky and Tennessee

claimants, conclusively establish that the Jackson Barnett, whose heirs are being herein determined, was the son of Thlesothle, who died about or shortly after the close of the Civil War, and that said Jackson Barnett was left with his aunt and uncle, the Jeffries, and then lived at the home of McCombs, until about grown; then lived at Colberts, where Albert (Barnett) Brady was born, being the son of said Jackson Barnett and Cinda; then lived at Leecher's Ferry until he was approximately 39 years of age; then lived about in the Senora, later Bryant, or Siah Barnett, neighborhood, all being in the Creek Nation, until finally he was taken to California where he died (pp. 5-38, Appellants' Brief in Circuit Court of Appeals, where all the pertinent evidence of the parties is digested, Vol. I, pp. 5-38, Appendix hereto; pp. 2-5, Answer and Reply Brief of Appellants in Circuit Court of Appeals, Vol. I, p. 179, et seq., Appendix hereto; and pp. 11-18, Petition for Writ and Supporting Brief herein).

That in the face of this unquestioned evidence on the part of all said parties, and in the face of the fact that counsel for respondents, Annie Beams, et al., admitted during the said proceeding and in their brief filed in the Circuit Court of Appeals, that the sole question of fact between petitioners, Dora Brady, et al., and Annie Beams, et al., was as to whether the Jackson Barnett, who was the father of Albert (Barnett) Brady, was the Jackson Barnett whose heirs are being herein determined, *said counsel for respond-*

ents significantly did not request the trial court to find any such fact and significantly and successfully opposed the court's approval of the requested findings of fact presented by petitioners, Dora Brady, et al., specifically covering the said most pertinent identifying facts as to said Jackson Barnett's whereabouts, place or places of residence, and family relations during the period of his life prior to reaching the age of 39 years, and that the said objection of counsel for respondents, and the refusal of the said judge to so find was because that any such findings of fact would be inconsistent with and preclude any finding or conclusion or judgment adjudging respondents, Annie Beams, et al., to be the heirs of the said Jackson Barnett. (Brief of Appellees in Circuit Court of Appeals, Vol. II, page 156; pp. 131-139, Brief of Appellants in the Circuit Court of Appeals, Vol. I, page 131-139, Appendix hereto; Answer and Reply Brief of Appellants in the Circuit Court of Appeals, pp. 2-9, pp. 179, et seq., Vol. I, hereto).

(g) Petitioners respectfully state the finding by the trial judge herein "that neither Albert Brady, Mary Fisk, his wife, nor Dora Brady, ever made any effort to cause him (Jackson Barnett) to have any relief, although now it is attempted to be made to appear that they had an interest * * * it was known by them that Jackson Barnett was in distress as disclosed by Exhibit 'I' in evidence * * * " (p. 714, Vol. II, Clk's Tr.; pp. 21-22, Petition for Writ and Supporting Brief herein), is conclusively indicative of the hostile feeling

and highly prejudiced state of mind of the trial judge toward petitioners.

That the uncontradicted evidence of all the witnesses of all the parties who testified in relation to this matter, and which evidence is digested in said Petition for Writ and Supporting Brief herein (pp. 75-76 and 90-93), is contrary to the said finding, and shows that Albert and Dora Brady had the said exhibit, containing the newspaper story, in their possession in 1917, and discussed the situation and affairs of their said father and grandfather, Jackson Barnett, with their neighbors, and there is no fact or circumstance supporting said finding, and same was the fruit of a prejudiced mind. Said Brady Exhibit "I" is a lengthy newspaper account, published September 2, 1917, of the alleged treatment of Jackson Barnett by the officers and representatives of the Interior Department relative to the handling of his great estate, and a facsimile of same is presented in full between pages 122-123 of appellants' brief, Vol. I, Appendix hereto, and the Court is respectfully requested to examine and consider same in connection with the above finding, and it is believed that the conclusion must be that in making such a cruel, unfounded and immaterial finding the mind of the trial judge was necessarily biased and prejudiced against the petitioners (pp. 22-23, 143-144, Petition for Writ and Supporting Brief herein).

(h) It is further evident that the Circuit Court of Appeals in affirming said judgment and this Court in deny-

ing the petition herein overlooked the sound reasoning in *Berger* v. *United States*, 255 U. S. 35, 41 S. Ct. 230, 65 L. Ed. 481, in substance that it is dangerous to commit to the trial judge the decision upon the truth of the facts alleged in the affidavit to disqualify said trial judge and the good faith of the affiant in filing same for the reason that nothing can be more illusive of estimate or decision than the effect of personal bias, prejudice or interest upon the mind of a trial judge, and that it must follow that where the evil of a trial and judgment by a disqualified judge has already occurred, such erroneous judgment should not be accorded the weight, consideration, and presumptions of a judgment fairly and validly rendered, and that this Court in the exercise of its inherent powers, functions, and duties will review such proceedings and judgment through the medium of the *writ of certiorari*.

(h) That the record herein shows the request of said Assistant United States Attorney that an investigator be assigned to investigate all claimants and their witnesses, other than the respondents, and said witnesses (p. 8, *supra*), was granted, and that as a result, both claimants and their witnesses, other than these petitioners, Dora Brady and Lucinda Watashe, and their witnesses, were indicted, tried and convicted of perjury during the said progress of the hearing herein and prior to the entry of judgment, and that a list of same was incorporated in the proceedings

herein at the suggestion of the trial judge (p. 8830, Vol. 18, Rep. Tr.).

4. That the record herein further shows that no improper conduct or crimes of any nature were charged or suggested against these petitioners, Dora Brady and Lucinda Watashe, or against petitioners' counsel, employee, or witnesses herein save and except the said unwarranted, unfounded, and gratuitous verbal attacks and charges preferred by the trial judge and counsel for respondents, Annie Beams, et al., during the said attempt of counsel for petitioners to introduce evidence herein. In this situation it is clear that the references to misconduct and crimes on the part of parties which appear in the opinion of the Circuit Court of Appeals as the basis of said actions and charges have no application to the case of these petitioners, Dora Brady and Lucinda Watashe, *since the record discloses no instances or provocative attitude or action on the part of counsel for petitioners, and since the evidence on the part of petitioners was not challenged, as being fabricated, and was not questioned or contradicted in any part, except by the said hostile and unsupported verbal attacks of the trial judge and opposing counsel* (pp. 103-111, Petition for Writ and Supporting Brief herein). That the fact is said opinion on its face shows that it does not decide the controlling points presented on the separate appeal of these petitioners, Dora Brady, et al.

5. That the finding of the trial court that Jackson Barnett "from his youth up had been and was an incompetent; that he was weakminded, and generally known as 'Crazy Jack,' and that he had never at any time had sufficient mental capacity to enter into a valid marriage contract", is immaterial and contrary to all the evidence on the part of all the witnesses presented by all the parties, *and which evidence is in substance that Jackson Barnett was an average Indian boy and man until after he left Leecher's Ferry in 1891 when about 39 years of age, and thereafter became a roving, shiftless "Snake Indian" and lived about from place to place* (pp. 12-14, 31-32, Petition for Writ and Supporting Brief herein, and volumes of record therein cited; and pp. 9-41, Appellants' Brief, Vol. I, Appendix hereto). *That the conclusion in substance that the issue of said Jackson Barnett could not on that account be legitimate and the petitioners as granddaughters be his next of kin, is contrary to law and the controlling decisions* (pp. 728-737, Vol. II, Clk's Tr., herein; pp. 12-14 and 142-143, Petition for Writ and Supporting Brief herein; and pp. 9-41, Appellants' Brief in Circuit Court of Appeals, Vol. I, Appendix hereto).

6. That the said finding and conclusion of the trial judge that there was no evidence that the parents of Albert (Barnett) Brady, Jackson Barnett and Cinda Colbert, were married, and the conclusion therefrom that "the said Lucinda Watashe and Dora Brady, the children of said

Albert Brady, are not the next of kin and heirs of said Jackson Barnett, Creek Roll No. 4524, whose heirs are being determined herein," and that he was "weakminded and generally known as 'Crazy Jack,' and that he never at any time had sufficient mental capacity to enter into a valid marriage contract" (p. 31, Petition for Writ and Supporting Brief herein), *aside from the fact that same is contrary to all the evidence, as is demonstrated herein, are erroneous for two additional reasons: First, as is presented on pages 124-125 of the Petition for Writ and Supporting Brief herein, since the enrollment record of Albert Brady shows that Jackson Barnett and Cinda Colbert were the parents of said Jackson Barnett, the presumption is they were married, and that he was legitimate, and, second, admitting for argument, although not the fact, that at the time said Jackson and Cinda lived together and Albert was born, said Jackson Barnett was incompetent, still after the death of Jackson Barnett and Cinda Colbert, their marriage cannot be successfully attacked in an effort to show the illegitimacy of the offspring of same.* Hunt v. Hunt, *et al.*, 23 Okla. 490, 100 Pac. 54; *Hughes* v. *Kano*, 60 Okla. 202, 173 Pac. 447; Section 677, O. S. 1931; *Ross* v. *Ross*, 175 Okla. 633, 54 Pac. (2d) 611; pp. 174-177 Appellants' Brief, Vol. I, Appendix hereto, *and the Circuit Court of Appeals overlooked and did not discuss or decide this controlling point.*

7. That the Circuit Court of Appeals further overlooked the fact that the controlling authority holds that in determining the right of Albert Brady to enrollment, as a member of the Creek Tribe of Indians, and determining his identity, information in the form of a notation on the record or card as to whether or not Jackson Barnett, the father of Albert Brady, was living or dead at the time of the listing of Albert Brady for enrollment, or that the said father was a member of any particular Creek Town, was such information as is not required as descriptive of the enrollee under the provisions of Section 21, of the Act of Congress, June 28, 1898, and on that account such notations were immaterial, *and also for the further reason that the Creek Town to which Albert Brady belonged was controlled by that of his mother, Sinda, and such incidental notations*, in the absence of special legislation requiring same, are without effect, and are not admissible in evidence (pp. 124-125, Petition for Writ and Supporting Brief herein; pp. 156-174, Appellants' Brief; pp. 59-61 Petition for Rehearing, Vol. I, Appendix hereto, wherein the above proposition is fully presented).

8. That where the census card or enrollment record of Albert Brady (Brady Exhibit "5"), the father of these petitioners, Dora Brady and Lucinda Watashe, which is in evidence herein, states that Jackson Barnett and Sinda (Cinda, Lucinda) were the father and mother of said Albert Brady, and the census card, or enrollment record of

Lucinda Watashe, formerly Brady (Brady Exhibit "10", p. 4997, Vol. 9, Rep. Tr.) *states that the parents of Lucinda Watashe were said Albert Brady and Alice Fox, it follows, under controlling decisions, and the presumption is that the said parents of both said Albert Brady and Lucinda Watashe were married, and that the said Albert Brady and Lucinda Watashe were legitimate, and that the findings and conclusions of the trial judge herein, in substance, that there was no evidence that said stated parents were married, and that Albert Brady and Lucinda Watashe were illegitimate, are erroneous, and the Circuit Court of Appeals erred in disregarding said authority and in approving said findings and conclusions and affirming said judgment* (pp. 41-42, para. 10 and 12, and pp. 124-125, Petition for Writ and Supporting Brief herein; pp. 156-174 Appellants' Brief; pp. 59-61 Petition for Rehearing, Vol. I, Appendix hereto, wherein the above proposition is fully presented).

9. That the trial judge, either overlooked, ignored or disregarded all the evidence on the part of all the parties, and the admissions, and stipulations on the part of respondents, as to the material and controlling facts, in refusing to approve and make findings of fact based thereon, which were duly and timely requested on behalf of the petitioners, and found all the controlling facts which are pertinent to petitioners' cause in the face of all the evidence on behalf of all the parties, and on that account the judg-

ment herein is contrary to and not supported by any evidence, and the Circuit Court of Appeals overlooked and did not refer to, discuss, or decide the point (pp. 10-18-130-140 Petition for Writ and Supporting Brief herein; Digest of all the evidence on the part of all the parties hereto relating to the cause of petitioners).

10. Petitioners state that while it seems clear from the above that the issuance of a *Writ of Certiorari* to review the said opinion and judgment of the Circuit Court of Appeals is within the legal discretion of this Court under Section 240 of the Judicial Code (Sec. 347 U. S. D. C., tit. 28), the Court also has jurisdiction as is held in *Ex parte Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385; *Shields* v. *United States*, 273 U. S. 583, 47 Sup. Ct. 478; *Quercia* v. *United States*, 289 U. S. 466, 53 Sup. Ct. 698; *In re Church Street Building Corporation*, 299 U. S. 24, 57 Sup. Ct. 88; *Turner* v. *United States*, 14 Fed. (2d) (8th Circuit) 360; *United States* v. *Beatty*, 232 U. S. 463, 467, 34 Sup. Ct. 392, 58 L. Ed. 686; *Berger* v. *United States*, 255 U. S. 22, 41 Sup. Ct. 230; and as stated in Section 6283, Vol. 8, Page 533, of Hughes Federal Practice, to issue said writ herein to review the said opinion and judgment under Section 262, Judicial Code, 28 U. S. C. A., Sec. 377, because the said trial judge, being disqualified, exercised excessive jurisdiction in said proceedings and in rendering said judgment, and the Circuit Court of Appeals erred in not vacating and setting the said judg-

ment aside on that ground (pp. 40, para. 8; 126-130, Petition for Writ and Supporting Brief herein).

11. Petitioners state that, as appears from the opinion in the said five appeals, being the separate appeal of these petitioners, Dora Brady and Lucinda Watashe, No. 2176, and the appeals of four other groups, which were separate and apart from the appeal of petitioners herein, all purporting to have been considered and decided together, but in which opinion the controlling points on petitioners' appeal were not decided, *the Circuit Court of Appeals clearly erred in overlooking or disregarding and failing to consider or decide the above stated grounds or points or reasons which were pertinent to petitioners' case, and wherein controlling questions of law are directly presented, and which, as clearly appears above, are bottomed on facts established by unchallenged evidence, and the Circuit Court of Appeals further erred in according, as the said opinion herein shows, to the proceedings, findings of facts, conclusions of law, and judgment herein of the said disqualified trial judge, the consideration, weight, and effect which are properly accorded to the proceedings, findings, conclusions and judgment of a qualified and unprejudiced judge* (P. 782), lower part, first col., 122 Fed. [2d]), *and the said Circuit Court of Appeals further erred in failing to conclude and hold on petitioners' said appeal that the proceedings, findings, conclusions and judgment herein by said trial judge after said collaboration with said Assistant United States Attorney,*

and subsequent to the filing of the said petition and affidavit to disqualify said judge on account of personal bias and prejudice were all in excess of the jurisdiction of said court, and further erred in failing to set same aside, and remanding said case for trial before a qualified judge, and this Court in concluding that the petition herein did not present any ground for review of the said proceedings overlooked the nature and significance of the above facts and proceedings.

Petitioners state that in their Petition and Supporting Brief for the Writ herein, because of the nature of the questions, the condition of the record herein; and other pertinent facts stated therein, and in compliance with the holding of this Court in *Southern Power Co.* v. *North Carolina Public Service Co.*, 44 S. Ct. 164, 263 U. S. 508, 68 L. ed. 413, and *Furness* v. *Yang-Tsze Ins. Ass'n.*, 242 U. S. 430, 37 S. Ct. 141, 61 L. ed. 409, they have presented a clear, definite, accurate and complete disclosure concerning the proceedings and questions here involved, attaching an appendix of two volumes containing the Briefs of Petitioners and Respondents in the Circuit Court of Appeals, supplying specific references to the record in support of each statement, to the end that members of the Court might readily verify same, and petitioners respectfully refer to the said Petition and Supporting Brief, Answer Brief, Typewritten Reply Brief and Volumes I and II of said Appendix herein.

That upon the foregoing grounds and reasons petitioners most respectfully urge that this Petition for Re-hearing

be granted, and that upon further consideration by the Court the proceedings and judgment herein be reversed, and that this cause be remanded to the trial court for hearing and determination by a qualified judge, or such other relief as may be deemed proper in the premises.

Respectfully submitted,

CHAS. E. MCPHERREN,
442 Key Building,
Oklahoma City, Oklahoma,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

I, CHAS. E. McPHERREN, counsel for the above named petitioners, Dora Brady and Lucinda Watashe, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in utmost good faith and not for delay.

CHAS. E. MCPHERREN,
Counsel for Petitioners.

March, 1942